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CIDED BY THE COURTS OF APPELLATE
JURISDICTION

IN THE
UNITED STATES, ENGLAND AND CANADA.

EDITED BY
THOMAS J. MICHIE.

VOLUME XI.
NEW SERIES.

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BASIL JONES AND A. R. YELLOTT.

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THE
AMERICAN AND ENGLISH
RAILROAD CASES

NEW SERIES

VOLUME XI

SAVANNAH F. & W. RY. CO.

v.

CHANEY.

(Supreme Court of Georgia, Aug. 5, 1897.)

Injury to Employee on Track—Signals—Insufficiency of Declaration.—A declaration in an action against a railway company for damages resulting from personal injuries did not set forth a cause of action where its only allegations relating to the circumstances under which the injuries were inflicted were, in substance, as follows, viz: That the plaintiff was an employee of the defendant, who labored in its roundhouse; that it was customary for him to walk between its lines of track so as to reach the roundhouse; that while so walking he was struck from behind by a moving car, which was being propelled towards him by an engine; that he was not warned of the approach of the car by the ringing of the bell or the blowing of the whistle of the locomotive, nor by call of the engineer or fireman, and that the company was negligent in failing to give such warnings.

Same—Alleging Absence of Contributory Negligence.—These averments are not sufficient to show that the plaintiff was not a trespasser, since it might or might not have been necessary for him to reach the roundhouse by walking between the lines of track, and it does not appear whether or not his custom in this respect was known or sanctioned by the defendant. As the declaration does not, by proper allegations, concerning these matters, affirmatively show he had a right to be at the place where he was when injured, it is proper to deal with him as a trespasser; and, this being so, the specific acts which caused his injuries, and which are averred to constitute the negligence entitling him to recover, were not, relatively to him, negligent at all, for the reason that they involved the breach of no duty due to him by the defendant.

Savannah, F. & W. Ry. Co. v. Chaney

Same—Demurrer.—Construing the petition most strongly against the plaintiff, it would not follow, as a conclusion of law, that under the facts alleged he was entitled to a verdict, and, accordingly, a general demurrer to such a declaration ought to have been sustained. (Syllabus by the Court.)

ERROR by defendant from Savannah city court.
Reversed.

The official report is as follows.

The declaration alleged: Defendant has damaged petitioner \$5,000. On or about January 8, 1895, he was in its employ as a laborer, and as such was generally employed in working in its roundhouse in Savannah. It was usual and customary for him to walk between its lines of tracks north of Gwinnett street so as to reach said roundhouse. On or about said date, while walking between said tracks on his way to the roundhouse in the course of his said employment, he was struck from behind by defendant's locomotive, and thereby had his right hand so badly crushed as to require its amputation above the wrist. The locomotive was behind a car pushing the car in the same direction petitioner was going, and he was not warned of its approach by the ringing of its bell, or the blowing of its whistle, or by the calls of its engineer or fireman, or in any other way, in consequence of which he was injured as aforesaid. Defendant was negligent in not warning him of the approach of the locomotive and car, in not having the bell or whistle of the engine sounded so as to warn him, or in some proper manner giving him notice of the approach of the engine and car, and was negligent in running into and injuring him as aforesaid, and in not having the engineer or fireman of the engine warn him of the approach of the engine and car.

Erwin, Du Bignon & Chisholm, and W. L. Clay, for plaintiff in error.

R. R. Richards and W. P. Hardee, for defendant in error.

LITTLE, J. The facts appear in the preceding official report. The headnotes give a statement of the rulings

Comer v. Hill

made in the case. We do not deem it necessary to elaborate them. They are fully supported by the following cases: *Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105; *Jenkins v. Railroad Co.*, 89 Ga. 756, 15 S. E. 655; *Holland v. Sparks*, 92 Ga. 753, 18 S. E. 990. Judgment reversed.

ATKINSON, J., dissenting.

COMER *et al.*

v.

HILL.

(*Supreme Court of Georgia, June 9, 1897.*)

Killing of Licensee on Track—Habitual Use—Notice to Servant—When Notice to Master.*—Knowledge on the part of a section master that a railroad bridge keeper's wife was in the habit of occupying with him, at night, a small house which the railroad company, for the purpose of protecting the keeper in bad weather, had caused to be erected near a trestle forming an approach to the bridge, and that the wife, in times of high water, used this trestle as a means of reaching the house, together with knowledge on the part of the supervisor of the railroad track, and also on the part of the supervisor of its bridges, that the wife stayed at this house with her husband, did not constitute such notice to those charged with the running of trains upon the railroad as to raise a duty on their part to warn the woman of the running of an extra freight train on the Sabbath Day, for the want of which warning she was exposed to danger and death.

Verdict Contrary to Evidence.—The evidence in this case did not warrant a verdict in the plaintiff's favor, and a new trial should have been granted.

(Syllabus by the Court.)

ERROR by defendants from Taylor county superior court. *Reversed.*

W. S. Wallace and *John D. Little*, for plaintiffs in error.

C. C. Thornton, *C. C. West*, and *O. M. Colbert*, for defendant in error.

*See note at end of case.

Comer v. Hill

COBB, J. Hill brought suit against the Southwestern Railroad Company and the receivers of the Central Railroad & Banking Company for the homicide of his wife. Upon the trial the testimony established the following facts: Plaintiff was employed by the defendants as a watchman of their bridge over the Flint river, in Taylor county. A little house, or shanty, standing upon wooden pillars, in order to be above the water in times of flood, was situated on the south side of the bridge, and was intended for the use of the watchman. Leading to the bridge was a trestle 170 yards long, and 15 to 17 feet high. Plaintiff's wife for over two years had been staying with him at night in this house. She had no business there connected with the railroad, and her only business was to keep a water gauge, for which she was paid by the government 25 cents a day. The railroad company had provided a dwelling house about a half mile away for the bridge keeper and his wife. In this house was contained a portion of the plaintiff's household effects, and it was occupied by him as a dwelling, except when he used the shanty near the bridge. When the water was low plaintiff and his wife went from the shanty to the dwelling house by a path. When the water was high, in order to leave the shanty and reach the dry ground, it was necessary to go upon steps to the trestle, and walk upon it to the earth embankment at its end. On the morning of the homicide, which was Sunday, the water being up, plaintiff and his wife started from the house by the bridge to go to their dwelling house. There being no train due according to schedule, and not expecting one to come, they went upon the trestle, and, after walking some distance thereon, a freight train, which should have passed four or five hours previously, came at a speed of 20 miles an hour, and plaintiff's wife was struck by it and killed. Plaintiff stepped from the track, and sat upon the cap sill, and was not struck. He had told his wife to get in a similar position, which she attempted to do; but the train struck her on the head, killing her

Comer v. Hill

instantly. When first seen they were 400 or 500 yards from the train. The speed was slackened to about 15 miles an hour after plaintiff was seen. The engineer and fireman each testified that they used all possible means to stop the train. The fact that plaintiff's wife was occupying the shanty near the bridge, and that she was accustomed to use the trestle in leaving the shanty in times of high water, was known to the section master as well as to the supervisor of the track and the supervisor of bridges of defendants. Plaintiff's wife was between 52 and 53 years of age, and had no children. There was a verdict for the plaintiff for \$3,500, and, the defendants' motion for a new trial being overruled, they excepted.

Was there evidence sufficient to show a knowledge by the defendants of the use by the plaintiff's wife of the trestle as a footway between the house near the bridge and the dwelling house, in order to charge the defendants with the duty of notifying her of the passage of trains which were delayed, and which were not running according to the regular schedules of the company? Not having any connection with the company, her presence in the house provided for the husband as bridge keeper was simply for his convenience and comfort, and did not raise any duty on the part of the railroad companies to her. In order for the duty to notify her of the passage of trains to arise against the companies, if, under the circumstances, any such duty would ever arise, it certainly must be shown that her presence from time to time upon the track of the company was known to those officers of the companies who had in charge the running and operating of trains. The evidence fails to show notice to any one connected with that department of the railroad companies which manages the running of their trains, or to any individual employee connected in any way with the operation of trains. The section master, who had charge of the roadbed near the bridge, and the supervisor of the track, whose duty it was to see that the track was kept

Killing of Licensee
on Track - Habitual
Use - Notice to
Servant When No-
tice to Master.

Note

in proper condition, and the supervisor of bridges, whose duty it was to see that the bridges were safe, knew that plaintiff's wife was using the house and trestle. Not one of these employees described was connected with the running of trains. The plaintiff's wife, therefore, being upon the trestle without authority and without the knowledge of the defendants, the only duty which was owing to her was to use all ordinary care to prevent harm coming to her after her presence upon the trestle was discovered. As the evidence established this to be the case, the verdict of the jury was unwarranted, and the court erred in not granting a new trial in the case. Judgment reversed. All concur, except FISH and LITTLE, JJ., who were disqualified.

Verdict Contrary to
Evidence.

ATKINSON, J. (concurring specially). Without assenting either to the correctness of the conclusion reached by the majority of the court touching the matters of fact involved in the record in this case, or to the doctrine that the verdict of a jury, based upon a conflict of evidence, when approved by the trial judge, is subject to review in this court, I concur in the judgment awarding a new trial for the special reason that, as matter of law, the verdict is excessive.

NOTE.

Notice to Servant—When Notice to Master.—Notice to a servant to be notice to his master must be as to some fact within the scope of the powers and duties of the servant as such. *St. Louis & S. W. R. Co. v. Threat*, 3 Am. & Eng. R. Cas., N. S., 358.

Where the business of an incorporated company is of such a nature as to require it to be conducted through servants or agents, notice to one of its officers relative to a matter in which he acted within the scope of his employment, and in the usual course of the company's business, will bind the company. *Pontchartrain R. Co. v. Hierne*, 2 La. Ann. 129.

Notice to an agent of a corporation relating to any matter of which he has the management and control, is notice to the corporation. *Pittsburg, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Ry. Rep. 199.

Notice to an agent in transactions in which he is employed, where it becomes his duty, by virtue of his employment, to act on such

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notice, is notice to the principal. *Denver, S. P. & P. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. Rep. 142.

Notice to an agent, to be binding upon his principal, must be concerning some fact within the scope of the powers and duties of the agent as such. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.

In order to charge a corporation with implied notice on account of actual notice to one of its agents or officers, it must appear that such agent or officer received the notice while acting within the scope of his duties and employment, and not while engaged in private business of his own. *Reid v. Bank of Mobile*, 14 Am. & Eng. R. Cas. 554, 70 Ala. 199.

LAKE SHORE & M. S. RY. CO.

v.

CONWAY.

(*Supreme Court of Illinois, Nov. 1, 1897.*)

Injury to Tower-man—Instructions—Estoppel.—Where the jury was instructed, at the request of defendant, that plaintiff was limited to the charges of negligence alleged in his declaration, and that unless the jury believed from the evidence that defendant was guilty of negligence as alleged by plaintiff, then the verdict should be for defendant, defendant is estopped from complaining of a prior instruction to the same effect given in behalf of plaintiff, though it appears from the record that there was no evidence to sustain one of the charges of negligence set forth in the declaration.

Damages—Permanent Disability.—An alleged permanent disability, in order to be a ground for damages, must be one that is reasonably certain to result from the injury complained of.

Same.—And the instruction that the jury may consider such permanent detriment as they believe from the evidence may probably and reasonably result from the alleged injury; but that the jury in the assessment of damages, must take into consideration only such elements of claimed damages or injuries as they believe are established by the evidence in the case, does not violate such rule.

Same—Not Chargeable with Notice of Defect—Track near Tower.—The duty of a tower-man to observe the approach of all trains and all passengers on the highway to his crossing in order to protect them by the proper operation of the gates in his charge, does not include the duty of inspecting the condition of the tracks, and where an injury to himself is the direct result of defective tracks near his tower house, he is not chargeable with notice of their condition.

JUDGMENT of the appellate court, first district, for the plaintiff, was affirmed by the supreme court.

Lake Shore & M. S. Ry. Co. v. Conway

This was an action brought by William R. Conway against the Lake Shore & Michigan Southern Railway Company to recover for an injury received on November 22, 1892, at Twenty-First street, Chicago. At that street crossing, the defendant maintained gates which were operated from a tower house situated near the northwest corner of the intersection of the tracks of the defendant with the street, and just west of the westernmost of the tracks. The plaintiff was in the employ of the defendant, and he operated the gates from the tower house. He was in the tower house when he received the injury. He worked from 5:30 p. m. to 7 a. m. each day. The defendant had two side tracks and two main tracks at Twenty-First street at the time of the accident. The westernmost of these tracks stood next to and at the foot of the tower house. This was only a side track, and a short one at that. On this side track, at a quarter past one in the morning, or thereabout, an engine with one car attached came from the south. The engine was headed south. The car was in the rear of the engine, and the engine backed the car north over Twenty-First street. In going over Twenty-First street the north pair of wheels of the car left the side track, while the south pair of wheels on the same car remained on the track as did also the engine. The derailment occurred after the car had passed over the line of the south sidewalk of Twenty-First street, and was halfway over the distance of the width of the street. The car derailed was moving three or four miles an hour. It was a box car. It moved only nine to ten feet after the derailment, but it struck the tower occupied by plaintiff, turning it over, and in the crash plaintiff was severely injured. The declaration contained but one count. The negligence charged in the declaration, in substance, was that the defendant "so carelessly, negligently, and improperly managed said railroad that, by and through the carelessness and negligence and improper conduct of the said defendant, the track of said railroad on which said train was then and there

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running at and near to said crossing was suffered and permitted to be and remain out of repair and dangerous for the running of trains thereon, and so carelessly, negligently, and improperly managed, operated, and conducted said train that, by and through such carelessness, negligence, and improper conduct, said train was insufficiently and improperly manned and lighted, and by and through and by reason of the carelessness, negligence, and improper conduct, aforesaid, one of the cars of said train jumped the track, and ran with great force and violence to and upon and against the support of the said tower house, in which the said plaintiff was, as aforesaid, engaged in the pursuit of his employment, as aforesaid, and, by running against the same, caused said tower house to fall a great distance," threw over a stove, and plaintiff was injured, etc. To the declaration the defendant pleaded the general issue, and, on a trial before a jury, the plaintiff obtained a verdict for \$9,000, upon which the court entered judgment. The defendant appealed to the appellate court, where the judgment was affirmed.

Wm. McFadon, for appellant.

Sullivan & McArdle, for appellee.

CRAIG, J. (after stating the facts). Upon request of the plaintiff, the court gave to the jury two instructions, both of which are deemed to be erroneous. Numerous objections have been urged against plaintiff's first instruction, but we have not the time, nor would it serve any useful purpose, to follow counsel in his extended argument in reference to the instruction. We do not regard the instruction as entirely free from criticism, but we do not think that it contains anything calculated to mislead the jury. In the first part of the instruction the jury was directed that if they believed from the evidence that the defendant is guilty of negligence as charged in the declaration, and the plaintiff, while in the exercise of due care and caution for his own safety, sustained, by reason of such negligence, the injuries charged in the declaration (or any of them), then the jury may assess

*Injury to Tower-
man—Instructions
—Estoppel.*

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charges against the defendant. One of the charges in the declaration was that the train of cars was improperly moved ; and it is said, as there was no evidence of that fact before the jury, the instruction was erroneous, in referring that question to the jury for their consideration. Upon examination of the evidence, it will be found that there was evidence of negligence in running and lighting the train. Moreover, defendant cannot complain of the error, if error it was, because it covered a similar instruction to be given. In defendant's instructions the jury was informed that plaintiff is limited and confined to the charges of negligence alleged in his declaration, and that unless the jury believe from the evidence that the defendant is guilty of negligence, as alleged by the plaintiff in his declaration, then the verdict of the jury should be for the defendant in this case. The rule is well stated that a defendant cannot complain of an instruction given for the plaintiff when he himself asks and procures to be given one of the same character. *Railroad Co. v. Sanders*, 154 Ill. 531, 39 N. E. 481. But it is said that, under clause 7 of the first instruction, the plaintiff was allowed to recover for loss of time and employment, not of a kind which it would be reasonably certain that he will receive, but he was allowed to recover for loss of time and employment if he was only reasonably likely to suffer them. In a case of this character it may be laid down as a general rule that the alleged permanent disability in order to be a ground for damages, must be one that is reasonably certain to result from the injury complained of. *Hutch. Carr.* (2d Ed.) 805, 806; 2 *Shear. & R. Neg.* 743; *Hardy v. Railway Co.* (Wis.) 61 N. W. 772; *White v. Railway Co.*, 61 Wis. 536, 21 N. W. 524. But, upon inspection of the instruction, it will be found that the rule indicated was not infringed upon or violated. The instruction was as follows: "(7) If the jury believe from the evidence that any portion or portions, feature or features, of the plaintiff's maladies resulting from the injury aforesaid is or are permanent, the jury may consider such permanent

Damages—Permanent Disability.

Same.

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malady or maladies and such detriment as they may believe from the evidence naturally, probably, and reasonably may result therefrom to the plaintiff in his person and health and ability to labor, and, having considered these elements, fix the plaintiff's damages at such sum as the jury may believe from the evidence is necessary to adequately, fairly, and justly compensate the plaintiff for the loss which the jury believe from the evidence is the direct, natural, probable, and proximate result or consequence of the injury, aforesaid; but the jury, in the assessment of damages, must take into consideration only such elements of claimed damages or injuries as they believe are established by the evidence in the case." If the last clause of the instruction had been omitted, there might be ground for complaint. But the last clause is so clear and emphatic that the jury should not consider any element of damage unless such damage was established by the evidence that we do not think the jury could be misled.

The second instruction complained of was as follows: "(2) The court instructs the jury that the plaintiff had a right to rely upon the defendant and its servants performing their duty with due care and caution, and was not obliged to investigate or inspect any part of the defendant's property, except such as pertained to or was connected with his own employment by the defendant." Appellee was employed by the appellant in the capacity of tower man. His business was to lower and raise the gates by machinery. His duty required him to look and observe the approach of all trains to the crossing and all passengers on the highway, and, by a proper operation of the gates, protect the traveling public on the highway and the different trains on the railroad tracks. But he had nothing to do with keeping the tracks of the railroad in order, nor did he have any means of knowing whether the tracks were in proper condition or not. His business was entirely distinct from them who have charge of the railroad tracks. If the tower house or the machinery connected therewith,

Same—Not Charge-
able With Notice
of Defect—Track
Near Tower.

Campbell v. New Jersey Dry-Dock & Trans. Co

where the plaintiff was employed to work, was out of repair and unsafe, it would have been the duty of the plaintiff to inspect the appliance, and report the defects to the railroad company; and if, after notice of the defects, he had failed to report them, and had been injured by the use of the defective machinery, he could not recover. But here the plaintiff had nothing to do with the railroad tracks or the condition as to safety in running trains over them. His duties did not require him to examine the tracks to ascertain whether they were kept in proper condition, so that trains could pass over them without running off or being thrown off. He had a right to presume as declared in the instruction, that the railroad company would furnish safe tracks, and keep them in a safe condition, so that trains would not be thrown off. We think the principle announced in the instruction was correct. The court refused several instructions asked by the defendant, but upon all questions of law involved in the case the court gave 15 instructions in behalf of the defendant; 12 as asked, and 3 others with slight modifications. So far, therefore, as questions of law were involved, the jury was fully and fairly instructed. The judgment of the appellate court will be affirmed. Affirmed.

CAMPBELL

v.

NEW JERSEY DRY-DOCK & TRANSPORTATION CO.

(Supreme Court of New Jersey, Feb. 28, 1898.)

Injury to Employee—Defective Appliances—Fellow Servants—Liability of Master.*—A master who furnishes to his servant safe and suitable appliances with which to do the work upon which he is engaged is not responsible for injuries received by the servant by reason of defects in appliances substituted by a fellow servant, for those furnished by the master.

(Syllabus by the Court.)

*See note at end of case.

Campbell v. New Jersey Dry-Dock & Trans. Co

Argued November term, 1897, before MAGIE, C. J., and DEPUE, GUMMERE, and LUDLOW, JJ.

Johnson & German, for plaintiff.

Frederick C. Marsh, for defendant.

GUMMERE, J. The plaintiff is a ship carpenter in the employ of the defendant company. While at work with other employees of the company, lowering a tank into the hold of the Wilkesbarre, a vessel which was laid up in the dry dock for repairs, one of the hooks on the tackle which was being used for lowering the tank broke, letting the tank down on his hand, and crushing it. The liability of the defendant for this injury is sought to be established on the ground that it failed to discharge the duty which it owed to the plaintiff of furnishing proper tackle for the work in which he was engaged, and of inspecting and keeping it in repair, and that this failure was the cause of the accident. The testimony of the plaintiff's own witnesses shows that this claim is without support. From that testimony it appears that the defendant company's tackle and hooks were kept in a shanty in the company's yard; that the work was being done under the supervision of one John Lyons, who is styled the "boss rigger"; that Lyons sent two of the men who were under him, Long and Shields, to get the tackle and hooks to be used in lowering the tank; that Shields went to the company's shanty, and got tackle and hooks from there; but that Long, instead of following his example, picked up a tackle and hooks which he found lying on the deck of the Wilkesbarre, and which belonged to that vessel, and not to the defendant corporation; that both sets of tackle and hooks were used in lowering the tank, one on each end of it; and that it was the hook on the tackle which was picked up by Long on the deck of the Wilkesbarre which broke, and let the tank down on the plaintiff's hand. These facts make it clear that the defendant did not fail in the discharge of the duty which it owed to the plaintiff, of using reasonable care to provide safe and

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proper tools for his use in his work, and to keep them safe. It was not the company's tackle or hooks which broke. For the condition of the one which did break it was not responsible. In the case of *Maher v. Thropp*, 59 N. J. Law, 186, 35 Atl. 1057, the plaintiff sued his master for injuries received by him while engaged in his master's work. It appeared that he was furnished with proper implements to do the work, but that, by the direction of his foreman, he undertook to do it with other tools, in consequence of which he received the injuries complained of. The court of errors, in deciding the case, said: "If safe and proper tools are supplied by the master, he is not liable for an injury which his servant receives by using, under the direction of the foreman over such servant, a tool not furnished for or adapted safely to the work." The rule laid down in *Maher v. Thropp* governs the case before us. In fact, there is even less merit in the present than in the cited case; for in the latter the unsafe tool was used with the knowledge and under the direction of the foreman, while in the present case it does not appear Lyons, the boss rigger, was cognizant of the fact that Long, instead of bringing the needed appliances from the company's shanty, had picked them up off the deck of the Wilkesbarre. It was proved in the case that it was a matter of frequent occurrence for the company's employees to use blocks, tackle, and hooks belonging to vessels which were under repair, instead of those which were furnished by the company, and we are told that this fact establishes the liability of the defendant for the plaintiff's injury. I am not able to appreciate the force of this contention. It does not appear that the company had any knowledge of this custom of its employees, but, even if it were otherwise, the result would be the same. The master discharges his duty to his servants by furnishing them safe and proper tools to work with. If they see fit to use other appliances in the stead of those furnished by him, they do so at their own risk, and cannot hold him responsible if such substituted appliances turn out to be unsafe for

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or unadapted to the work in hand. The jury having found for the plaintiff in this case, their verdict should be set aside, and a new trial ordered.

NOTE.

Negligence in Selection of Machinery.—A master is not responsible to a servant for the act of a fellow-servant in negligently selecting a defective instrument, an iron hook, to which to attach a pulley to raise a heavy weight in a boiler shop, that being a proper detail of the work in which the servants were engaged. *Ling v. St. Paul, M. & M. R. Co.*, 50 Minn. 160, 52 N. W. Rep. 378. A building contractor who has provided safe and suitable machinery is not liable for a personal injury to an employee occasioned by co-employees' errors or negligence in selecting the particular appliances; as portions of a derrick employed in settling stone. *Hames v. Sullivan*, 1 Ill. App. 251.

WALKER *et al.*

v.

SHELTON.

(*Supreme Court of Kansas, March 5, 1898.*)

Killing of Employee—Contributory Negligence—Question for Jury.—In an action for the killing of a section foreman by his employer's train while decedent was attempting (as it was his duty to do) to lift a hand car from the track where it is alleged that his death was the result of recklessness on the part of defendant's engineer after seeing decedent's peril, and there was evidence to support the allegation, and the question of contributory negligence was properly submitted to the jury, a verdict for plaintiff will not be disturbed.

ERROR by defendants from Chase county district court. *Affirmed.*

A. A. Hurd and *Stanbaugh & Hurd*, for plaintiffs in error.

Madden Bros., for defendant in error.

PER CURIAM. Action by Rosa M. Shelton, the widow of Patrick Shelton, to recover damages for the death of her husband, who was killed while in the employ of the railroad company. He was a section foreman, and was endeavoring, with the assistance of one man, to lift a hand car from the track, because of the

Walker v. Shelton

approach of an extra train, but was unable to do so, and, when the hand car was struck by the locomotive, a part of the same was thrown against Shelton, killing him. Two grounds of negligence were alleged: One, that the engineer, although he saw the peril of Shelton, and could, by the exercise of reasonable prudence, have stopped the train and prevented the injury, failed to exercise any care, but continued to run at an excessive rate of speed until the collision occurred; the other, that the company had failed to furnish sufficient help to operate the hand car, and for that reason the men were unable to remove the same from the track.

The question of the failure to furnish adequate help was not submitted to the jury, and the negligence upon which the verdict of the jury was based was that of the engineer in not stopping his engine after discovering the position and peril of Shelton on the track. The averments of the petition certainly made a case of negligence against the company, and we think there was sufficient testimony to support the charge of negligence and to sustain the findings of the jury. If the engineer recklessly ran onto them after discovering that the hand car was fastened on the track, and that they were unable to remove it, or if it were reasonably apparent to him that the car could not be moved by the men, and thereafter he had time to stop the train and prevent a collision, it must be held that he was negligent. Whether Shelton exercised ordinary diligence in the attempt to remove the car, and to gain a place of safety, is peculiarly a question for the jury. It was his duty to use every exertion to lift the hand car, and clear the track, and thus avoid imperiling the lives of the passengers and employees on the coming train. Under all the testimony, it cannot be said, as against the finding of the jury, that he was guilty of contributory negligence. The findings of the jury, although criticised, seem to be fairly consistent with each other and with the general verdict, and we see no good reason to complain of the instructions. Finding no error in the record, the judgment of the district court will be affirmed.

Lemery.v. Boston & M. R. Co

LEMERY

v.

BOSTON & M. R. Co.

(*Supreme Judicial Court of Massachusetts, Jan. 6, 1897.*)

Injury to Employee—Negligence—Bill of Exceptions.—In an action by a railroad employee to recover damages for personal injuries alleged to have been caused by the company's negligence, the plaintiff's bill of exceptions set forth that he "submitted the following statement of facts as his offer of proof of the cause of his injury; the following are the facts which the plaintiff offered to prove, and upon which he relies to maintain his action." *Held*, that the words quoted sufficiently declared that the plaintiff relied upon the facts stated in his bill of exceptions to prove such negligence.

Same—Specifications of Negligence—Defective Road Bed.—It was alleged in the first count of the declaration that the defendant was riding upon a car which had been switched off the main track onto a side track, and, owing to the negligence of some employee of the defendant, the car jumped the track; the second count alleged that the car jumped the track as aforesaid by reason of a defect in the ways, works, and machinery of the defendant, which had not been discovered because of the negligence of some employee of the defendant; and the plaintiff being directed to specify the negligence on which he relied, stated that he was unable to do so with more precision than he had done in his pleadings, but offered to prove that neither the ballasting nor grading of the side track were as good as that of the main track, and that cars did not run as smoothly on the former as on the latter. *Held*, that it sufficiently appeared that the plaintiff relied upon the defective condition of the road at the place of the accident to establish negligence on the part of the defendant.

Same.—And a remark at the time by plaintiff's counsel to the court to the effect that it was impossible for the plaintiff to determine the cause of the accident was not a withdrawal of the latter's contention that it was the result of a defective road.

EXCEPTIONS from Suffolk county superior court.
Exceptions sustained.

S. A. Fuller, for plaintiff.

Solomon Lincoln, for defendant.

ALLEN, J. At the trial, the plaintiff's counsel read the pleadings and proceeded to open the case to the jury,

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whereupon, on motion of the defendant, the court directed him to specify the negligence on the part of the defendant on which he relied. The plaintiff thereupon said that he was unable to state with any more precision than he had done in his pleadings the cause of the accident complained of; but, in his bill of exceptions, as presented by him to the court, it is set forth that he "submitted the following statement of fact as his offer of proof of the cause of his injury; the following are the facts which the plaintiff offered to prove, and upon which he relies to maintain his action." The commissioner finds that, in order to conform to the exact truth, the words in quotation marks should be stricken out, and the following inserted in place thereof, viz: "Offered to prove the following facts." The defendant now contends that the bill of exceptions as presented to the court did not exhibit correctly the manner in which the plaintiff presented his case to the court, in that he did not state that he relied upon these facts to prove the injury. We are of opinion that this variation is not of sufficient importance to defeat the plaintiff's right to prove his exceptions. The plaintiff was in court seeking to maintain his case. He had read the pleadings. Being directed to specify the negligence relied on, he referred to the pleadings, which he had just read, and offered to prove certain facts, which he proceeded to state. It seems to us quite clear that he offered to prove these facts as sustaining his case, and as showing the negligence relied on. The commissioner also finds that the statement of facts offered to be proved, as set forth in the bill of exceptions, varied somewhat in phraseology and order from the statement of facts actually made at the trial. It is not, however, contended, on the part of the defendant, that this variation is important; and we think the statement as made in the bill of exceptions conformed in substance to the statement actually made at the trial, and that the plaintiff's bill of exceptions, as presented, should not be defeated on this ground, but might and should have

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been amended, if the changes were deemed to be of enough importance to require attention. *Morse v. Woodworth*, 155 Mass. 233.

We proceed, therefore, to consider the case on its merits, and for this purpose we take the bill of exceptions in the commissioner's draft and form which he finds to conform exactly to the truth. The declaration was in two counts,—the first being at common law, and the second under the employer's liability act. The first count alleged that the plaintiff was working in the employ of the defendant, and was riding upon a car which had been switched off the main track onto a track known as the "D'Estey Track," and, while so riding and working "by reason of the negligence of the defendant, its agents, officers, or servants, who were not the fellow servants of the plaintiff, said car on which he was working jumped the track, to wit, the D'Estey track, near or at a frog," etc. The second count adds an averment "that said car jumped the track as aforesaid by reason of a defect in the ways, works, and machinery of the defendant, which arose from or had not been discovered or remedied, owing to the negligence or carelessness of some person in the employ of the defendant corporation, and intrusted by it with the duty of seeing that the ways, works, and machinery were in a proper condition." The plaintiff was directed to specify the negligence on which he relied; and, having stated that he was unable to state, with any more precision than he had done in his pleadings, the cause of the accident, because he lost his arm, and was immediately removed from the place of the accident, he offered to prove that four cars had been cut off or detached from the rear end of a freight train, and were moving down the D'Estey track, and the car immediately ahead of that upon which he was riding left the D'Estey track, and was derailed, as also the car upon which he was riding, whereby he was thrown to the ground and hurt; that he was in the exercise of due care, and that no fellow servant of his contributed to the

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car's jumping the track at the frog described in the declaration; that upon the D'Estey track, described in the declaration, the cars did not run so smoothly as they did upon the main tracks; that the train was running at a rate of speed which was not unusual or improper; that, before the accident, cars had jumped the track at the same place, and the track had not since been fixed and repaired; and that the ballasting or grading of the track was not so good as upon the main track. From this we think it was sufficiently plain that the plaintiff relied on the ground that the railroad was defective at that place. The court required him to specify what negligence of the defendant he relied on. He answered, in substance: A defective road by reason of which the cars jumped the track. There was then a colloquy between the court and the plaintiff's counsel, in which the court said, "It is an entirely different statement from any that has been heretofore made." And again, "You said repeatedly you did not know what caused the accident." To this the plaintiff's counsel replied, "I say so now, your honor. I don't know what caused the accident; and I said it was not within human possibility to determine, on the part of the plaintiff, what caused the accident, but the accident did happen, and I have merely stated the environment." We do not think this statement ought to be construed as a withdrawal of the plaintiff's contention that the accident happened in consequence of a defect in the road.

We need not consider, at this time, the question whether negligence on the part of the defendant could be inferred merely from the happening of the accident, without more. The plaintiff did not rely solely upon the accident, but offered to prove other facts tending to show a defective road, viz. due care on his own part and on the part of his fellow employees, the want of smoothness in the running of the cars, and the inferiority of this track to the main track in respect to ballasting or grading. In an opening statement, it was not necessary for him to go further in defining how

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rough the road was, or how poor was the ballasting or the grading. Taking the offer of proof of these other facts in connection with the happening of the accident, in the opinion of a majority of the court, it was enough to entitle the plaintiff to put in his evidence. Exceptions sustained.

MISSOURI, K. & T. RY. CO.

v.

ROBERTS.

(*Court of Appeals of Texas, May 25, 1898.*)

Injury to Engineer—Excessive Speed Within City—Instruction.*— An engineer injured while running his train within city limits at a rate of speed higher than that permissible under an ordinance of the city, cannot recover for such injury, if such excessive speed was the proximate cause thereof, whether or not the company was negligent in regard to appliances.

APPEAL by defendant from Waller county district court. *Reversed.*

Baker, Botts, Baker & Lovett, for appellant.
Ewing & Ring, for appellee.

FLY, J. Appellee sued to recover damages for personal injuries alleged to have been caused through the negligence of appellant. It was alleged by appellee that he was in the employ of appellant as the engineer of a switch engine, and was on August 24, 1896, operating an engine in the switch yard of appellant in the city of Houston, Tex.; and, while operating said engine and backing same with a number of freight cars attached to the front of the engine, the latter went through a misplaced switch, and appellee, seeing that a collision was imminent, having endeavored and failed to stop the engine, leaped from it, in order to escape the danger, and crushed the bones of his foot and ankle.

*See note at end of case.

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It was further alleged that appellee could have stopped his engine if there had not been defects in the reverse lever, the brakes gib, and other appliances; that, a short time before the accident, appellee had called the attention of appellant to the defects, and appellant had promised to repair the same, but had failed to do so. It was charged that the switch was misplaced through the negligence of an agent of appellant. It was answered that the agent who left open the switch was a fellow servant of appellee; that appellee was guilty of contributory negligence in not keeping a lookout on the engine, as it was his duty to do; that appellee was guilty of contributory negligence in running the engine at a greater rate of speed than six miles an hour, in violation of an ordinance of the city of Houston, and, if he had not been so running the engine at such unlawful rate of speed, he could have stopped his engine, and avoided the accident; and, also, that appellee ought not to recover, because he was running the engine with full knowledge of its defects.

Appellant asked the following charge: "You are charged that should you believe from the evidence that plaintiff was injured at the time and place substantially as alleged by him in his petition; and should you further believe that, immediately before the accident of which he complains occurred, he was running his engine within the corporate limits of the city of Houston at a rate of speed in excess of six miles per hour; and should you further believe that, had plaintiff not been running his engine at a rate of speed in excess of six miles an hour, he could and would have stopped same in time to have prevented the collision and his resulting injuries,—then, if you so believe, you will find for the defendant, and so say by your verdict." It was in proof that there was in force in the city of Houston at the time of the accident an ordinance which provided: "It shall be unlawful for any engineer or other person in charge of a locomotive engine or train to run the same within the corporate limits of the city at a greater rate of speed than 6 miles per hour; and any person so offending

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shall, upon conviction before the mayor, be fined in any sum not less than twenty-five (25) nor more than one hundred dollars." The accident occurred in the corporate limits of the city of Houston, and there was testimony tending to prove that appellee was running the engine, immediately before the accident, at a higher rate of speed than six miles, or, in other words, that he was violating an ordinance of the city. Appellant had alleged that, if he had not been running his engine at such rate, he could have stopped the same, and the injury would not have occurred. Common sense would suggest that a train could be stopped more readily when running at a low rate of speed than when running at a high rate; and, without entering into a discussion of the facts, we are of the opinion that circumstances demanded a submission of the issue sought to be presented in the requested charge above copied.

It is the uniform ruling in this state that running an engine within the limits of a city at a higher rate of speed than that fixed by ordinance is negligence, as a matter of law; and that the engineer in this case was violating such an ordinance if he was going at a higher rate of speed than six miles is clear. If the violation of that ordinance was the proximate cause of his injury, then he is not entitled to recover. The fact that his employer may have known that the ordinance was regularly violated by its employees, or even the fact that it may have commanded its violation, would not relieve appellee from the effects of his disregard of the law. If his act in violating the ordinance concurred with the negligence of appellant in producing the result, he cannot recover. We can see no reason in the contention that, while appellee's acts in violating an ordinance might be negligence *per se* as to the general public, it would not be so as between master and servant, especially when the former has countenanced the violation of the law. If it was negligence in one case, it would be in the other. We therefore hold that if appellee was injured while violating an ordinance of the city of Houston, and such violation was the proximate cause of the in-

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jury, or concurred with the negligence of appellant in producing the injury, he is not entitled to recover. Cooley, Torts, p. 174. It would be contrary to public policy for courts to relieve a citizen of the consequences of his acts in violating law, or his duties to society, and it can be no excuse or defense because some one else assisted in the offense. The question in regard to the remittitur will not probably occur on another trial, and the other assignments are not well taken. For the error in refusing the charge herein copied, the judgment is reversed, and the cause remanded.

NOTE.

Injury to Employee—Speed in Violation of Ordinance—Proximate Cause.—Negligence in running a train through a city at a greater rate of speed than is allowed by an ordinance will not defeat a recovery for an injury to an employee, where the speed of the train does not cause the injury. *Lake Shore & M. S. R. Co. v. Parker*, 41 Am. & Eng. R. Cas. 339, 131 Ill. 557, 23 N. E. Rep. 237; *affirming* 33 Ill. App. 405.

LOUISVILLE & N. R. CO.

v.

VEACH.

(*Court of Appeals of Kentucky, June 10, 1898.*)

Injury to Brakeman—Inspection of Foreign Cars.*—It is the duty of a railroad company receiving foreign cars to make a careful superficial examination of their condition; and to warn its employees when it is patent that such cars are so constructed as to render them more than ordinarily dangerous.

Contributory Negligence—Question for Jury.—Where there was no evidence to show that plaintiff would not have been injured had he used a coupling stick, as the rules of the company required, and the evidence was conflicting as to whether or not a coupling stick was accessible to him at the time, the question whether his failure to use a coupling stick was the proximate cause of his injuries was

***Inspection of Foreign Cars.**—See *Alabama G. S. R. Co. v. Carroll*, (C. C. A.) 9 Am. & Eng. R. Cas., N. S., 759, and extensive note, 788 *et seq.*

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for the consideration of the jury; and was properly submitted by the instructions of the court.

Instructions.—An instruction is not erroneous merely because it groups a number of propositions together, if it is not calculated to mislead an ordinarily intelligent jury.

APPEAL by defendant from Christian county circuit court. *Affirmed.*

Joc McCarroll, H. W. Bruce, and B. D. Warfield,
for appellant.

W. S. Pryor, John Feland, W. R. Howell, and C. H. Bush, for appellee.

BURNAM, J. Appellee in attempting to couple two cars belonging to the Union Tank Line Company, which were being transported by appellant, had three fingers and the end of the thumb on his right hand mashed off between the iron bumpers thereof. Case Stated. He alleges, in substance, that he was an inexperienced brakeman, having been employed in that capacity on a local freight train of appellant for only about six weeks; that he was taken off of this local train but four days before the accident; that he was awakened at 3:45 a. m. on the morning of the accident by appellant's watchman, to go out on train No. 65, which was to leave at 5:15 a. m.; that he had never been employed on this train before; that, when he got to the yard, it was necessary that the train should be made up at once, in order that it might get out on time; that it was his duty as brakeman to couple the cars; that he examined the caboose to procure a coupling stick, but could find none where they were usually kept, and that, to avoid delay, it was necessary that he should make the coupling with his hands, and that, in so doing, they were caught between the iron bumpers; that the drawheads and coupling apparatus on the cars he was required to couple were unusual and unfamiliar to him, and exceedingly dangerous; that the cars had double iron bumpers, or "dead irons," about 10 inches square on each side of the coupling apparatus, and that these bumpers extended further out than the drawheads, and came into

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contact with each other before the drawheads of the respective cars ; that the train started before daylight ; and that he had received no notice or instruction from any of his superiors of the peculiar character of these couplings, and had had no opportunity of becoming acquainted with them. He also charges that the engineer backed the portion of the train next to the engine so rapidly as not to afford him reasonable time to make the coupling with safety. Defendant, by way of defense, alleges—First, that plaintiff was guilty of contributory negligence in attempting to make the coupling without the use of a coupling stick which had been furnished to him, and which the rules of the company imperatively required that he should use ; second, it alleges that the cars which the plaintiff undertook to couple were owned by the Union Tank-Line Company for shipment of oil in large quantities ; that appellant is a common carrier of freight, and that, when these cars were delivered to it by a connecting line, it was bound by law to receive and transport them on its railroad if they were without material defects of construction which might be ascertained by ordinary inspection, regardless of the kind of coupling apparatus which might be attached thereto : that the cars were without defects known or discoverable to it ; and that it was not responsible for extra hazard in coupling growing out of difference of construction between them and cars used on its own line ; and that plaintiff knew the peril, and, in attempting to couple them, assumed the risk incident thereto, especially as he was acting in violation of the rules of the company in attempting to do so without the use of a coupling stick. The issues being made up, plaintiff recovered verdict and judgment for \$3,000, from which this appeal is prosecuted. Appellant relies for reversal on the following grounds : First, because the verdict and judgment were flagrantly against the law and evidence ; and, second, that the court erred in instruction No. 1 given to the jury, and that the court especially erred in overruling defendant's motion for a peremptory instruction.

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There seems to be very little dispute as to how this accident occurred, appellee being the only witness. He says that he signaled the engineer to back up; that he noticed the stationary car which he was to couple had large double iron bumpers, 10 inches square, on each side of the drawheads and coupling apparatus, but that it was so dark that he did not discover that the car in front of it had similar appliances; that, when he went to make the coupling and drop in the link, he saw his arm was about to be caught between the iron bumpers, which extended further out than the drawheads; that he jerked back, but not in time to prevent his hand from being caught between the bumpers. He testifies that coupling cars with these "dead irons" on both sides of the drawbars is very dangerous; that he had never had any experience in coupling cars constructed with the double bumpers; that the cars of the defendant company which he had coupled previously to that time had only single bumpers; that no one gave him any warning of this, to him, unusual apparatus; that, if he had been familiar with the character of the coupling, he would not have attempted to make it; that he had searched for a coupling stick that morning in the place where they were usually kept, and was unable to find one; and that brakemen, so far as he had observed, were not in the habit of using the coupling stick. A number of witnesses were introduced by appellant, who testify that there were coupling sticks in the caboose that morning in the place where they were ordinarily kept. Mr. Courley testifies that he was the regular car inspector for the company at the shops in Nashville, Tenn.; that he had received a message to examine the cars in question upon their arrival in Nashville, after the injury; that he did examine them, and found the links, springs, and everything about them in good condition; that, when the drawheads merely touch, the dead irons were about $4\frac{1}{2}$ inches apart, but, when the drawheads come together in coupling, the spring gives way, and dead irons meet every time, whether they extend fur-

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ther out than the drawheads or not ; and that, if a man should have his hand between the dead irons, it would certainly be mashed. None of the witnesses introduced by appellant deny that the construction of these cars, owing to the peculiar character of the coupling apparatus, and the fact that they have the double bumpers on each side thereof, makes it much more dangerous to couple them than to couple cars with the single bumper or the apparatus ordinarily found attached to the cars of the defendant company, or that, in attempting to make the coupling without the use of the coupling stick provided by the company, the danger and hazard is materially increased. Nor is it attempted to be shown that the attention of appellee had been called to the peculiar character of construction of the coupling apparatus on these cars, or that he ran any greater risk in coupling them than in coupling the cars ordinarily used by the company.

In *Railroad Co. v. Williams*, 95 Ky. 200, 24 S. W. 1, this court says "that, where one railroad company receives the cars of another on the line of its road for transportation, it is the duty of the company

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man - inspection
of cars.

taking them to make careful superficial inspection of their condition, such as an ordinarily prudent man engaged in such business would make for the protection and safety of the employees required to handle the cars ; and when there is a patent defect, and an injury occurs to an employee by reason of a defect that is unknown to him, the company is responsible ; and that this rule applies, not only where the foreign car is out of repair, but also where it is patent that it is so constructed as to render it more than ordinarily dangerous during the act of coupling." Here, the defendant knew that plaintiff was a comparatively inexperienced man, having been employed in the railroad business only a few weeks on a local train, and using only the cars ordinarily found on its own lines. He had had no experience in coupling cars with the double bumpers and peculiar apparatus described as part of the cars of the Union Tank-

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Line Company; and it is evident that to safely make this coupling required more care and a higher degree of caution than to couple the ordinary cars then in use by the defendant company; and appellee, before being required to make this coupling, should have been warned of its peculiar character, so that he could have been upon his guard. In *Railroad Co. v. Williams*, *supra*, this court said: "It is not expected of a brakeman that he shall make an inspection for himself, as it must constantly happen that he is required to couple and uncouple cars without time afforded him to make even a cursory inspection." From the proof in this case it is apparent that appellant furnished appellee with a coupling stick, and that the rules of the company required him to use it; but in *Railroad Co. v. Foley*, 94 Ky. 229, 21 S. W. 867, this court, in passing upon a state of facts almost identical with those in the case at bar, held "that the written agreement was not binding upon plaintiff unless the coupling stick was in fact indispensable or necessary for the security of brakemen against danger incident to coupling cars, for defendant had no right otherwise to bind plaintiff to use the stick"; the court holding the decisive question to be "whether but for plaintiff's failure to use the coupling stick on the occasion of receiving the injury complained of it would not have happened." In this case there is no proof conducing to show that the injury would not have occurred if plaintiff had used the coupling stick, and the evidence is also conflicting as to whether or not such stick was accessible to him. At all events, it was a question of fact which, under previous opinions of this court, was properly submitted to the jury.

By instruction No. 3, given at the instance of defendant, the jury were told "that, if they believed from the evidence that the plaintiff's injury was the direct result of his failure to use a coupling stick in the performance of his duties, yet he cannot excuse himself, and hold the defendant liable, upon the ground that other brakemen had performed the same kind of service in the same way, if he knew or ought to have known that such a

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performance of his duties was hazardous and in violation of defendant's rules." By instruction No. 4 they were told "that if they believe from the evidence that the plaintiff, by his own imprudence and want of care in attempting to couple two of the Union Tank Company's oil cars without a coupling stick, contributed to his own injury, and that such attempt was the direct and proximate cause of his injury, and without which it would not have occurred, they must find for the defendant." In instruction No. 5 they were told "that, in accepting employment with the defendant, the plaintiff assumed all risks and perils ordinarily attending the performance of his duties as brakeman. The defendant is no insurer of the lives or safety of its employees, and is not liable to them nor to the plaintiff for injuries or accidents not caused by its own negligence." It seems to us that these instructions fully and fairly present to the jury questions of contributory negligence growing out of appellee's failure to make use of the coupling stick.

It is especially insisted for appellant that the first instruction given at the instance of the plaintiff was confusing and misleading, in that it grouped a large number of propositions together. By this
Instructions. instruction the jury were told "that if they believed from the evidence that the dead irons projected from the body of the cars which the plaintiff attempted to couple in such way and to such extent as to make it more than ordinarily unsafe and dangerous to couple them; and that, by reason of said projecting dead irons, the injury to plaintiff occurred, and these projecting irons were not used on the cars of the defendant; and that the servants of the defendant whose duty it was to inspect the cars knew, or by the exercise of ordinary care could have known, that said irons did thus project before the plaintiff was injured, and failed to notify him thereof; and plaintiff, in discharge of his duty, undertook to make said coupling, and it was not his fault or neglect that he did not then have a coupling stick to use in making said coupling; and that he did

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not then know or have reasonable opportunity to ascertain that said dead irons thus projected,—they must find for the plaintiff the damages which he sustained in attempting to make said coupling." While it is true that this instruction groups a number of propositions together, it properly directs the attention of the jury to the conditions upon which plaintiff was entitled to recover, and we cannot say that it was calculated to mislead an ordinarily intelligent jury. Finding no error in the judgment appealed from, it must be affirmed.

REITER

v.

WINONA & ST. P. R. Co.

(*Supreme Court of Minnesota, May 12, 1898.*)

Assumption of Risk from Falling Embankment while Excavating.*
—Under the rule, recently stated in *Swanson v. Railway Co.* (Minn.) 70 N. W. 978, that servants, while performing their duties, are bound to take notice of the operation of familiar natural laws, and to govern themselves accordingly, it is *held* that the complaint herein failed to state a cause of action.

(Syllabus by the Court.)

APPEAL by defendant from Brown county circuit court. *Reversed.*

Brown & Abbott, for appellant.

Jos. A. Eckstein, for respondent.

COLLINS, J. From the complaint herein, it appears that plaintiff was a common laborer in defendant's employ, engaged with others in the loading of flat cars with a steam shovel at a gravel pit, all work being done under the direction of a foreman having full and com-

*See *Bradley v. Chicago, M. & St. P. R. Co.*, 8 Am. & Eng. R. Cas., N. S., 728, and *note*, p. 741.

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plete charge; that it became necessary to move the shovel nearer the gravel, whereupon the foreman ordered plaintiff to go behind it, and between it and the embankment, "which was almost a perpendicular bank of soil and gravel, about twenty feet in height, there to assist in laying a new track upon which to run the shovel; that, while plaintiff was obeying these orders, the embankment caved, the soil and gravel fell upon plaintiff, causing the injuries upon which he bases the right of action." There are other allegations not here material, as we view the case, which comes before us on an appeal from an order overruling a general demurrer to the complaint.

It is nowhere alleged that the embankment, almost perpendicular, and 20 feet high, caved in by reason of any other than natural causes,—the operation of the laws of gravitation. Assuming, as we must, that the plaintiff was a person of ordinary intelligence, he well knew and understood the operation of these natural laws, and therefore should have anticipated the result. The danger constantly attending him when at work was to be apprehended, and he assumed the risk. No distinction can be made between the complaint now before us and that considered in *Swanson v. Railway Co.* (Minn.) 70 N. W. 978, in which we held that a general demurrer to the complaint was well taken, under the rules already laid down in this court. See the cases there cited. The demurrer should have been sustained. Order reversed.

BUCK, J., absent, took no part.

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CHICAGO R. I. & P. RY. CO.

v.

COWLES.

(*Supreme Court of Nebraska, March 17, 1898.*)

Injury to Employee—Fall from Engine—Failure to Furnish Proper Appliances—Contributory Negligence.*—In an action for personal injuries against a railroad company, it appeared from the evidence that plaintiff was at work as a wiper upon an engine, after dark; that he was furnished with a torch, but upon its going out he attempted to regain the cab by a route which he knew to be dangerous, though he knew there was a safe route available, and fell from the engine and was injured. *Held*, that owing to plaintiff's contributory negligence the verdict in his favor must be reversed.

ERROR by defendant to Jefferson county district court. *Reversed.*

M. A. Low, W. F. Evans, L. W. Billingsley, and R. J. Greene, for plaintiff in error.

J. H. Broady and John Heasty, for defendant in error.

RYAN, C. This action was brought by William D. Felkner in the district court of Jefferson county for the recovery of damages alleged to have been sustained by him while in the employ of the Chicago, Rock Island & Pacific Railway Company. There was a verdict, on which judgment was rendered for plaintiff in the sum of \$2,500. During the pendency of these error proceedings in this court, Felkner died, and there was a revivor of the action against his administrator. The parties hereinafter will be designated plaintiff and defendant according to the status of each when the case was in the district court. The negligence of the defendant charged in the petition was, in substance, as follows: February 12, 1894, and for a long period

*See note at end of case.

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prior thereto, plaintiff was a wiper in defendant's employ, and, as such, he was under the sole control, directions, and orders of the night foreman of defendant's engine house at Fairbury. On the date above mentioned plaintiff was ordered by said night foreman to take certain engines in defendant's yards to coal chutes in said yards, and fill the tenders thereof with coal, and return the same to the engine house, to be placed in stalls therein. Pursuant to said orders, at about 10 o'clock p. m. on said day, plaintiff took one of defendant's engines from the side track on which it stood, and caused it to be propelled to defendant's coal chutes, and thereupon filled the tender with coal. In the performance of the work required of him to be performed, it became necessary for plaintiff to climb from the cab of said engine to the top of the tender or tank thereof, and, by the use of a shovel provided by defendant for that purpose, to remove the coal, or a part thereof, from the apron of the coal chute into the tender, and to scatter the same around therein, to permit said apron to be elevated to its proper place. Plaintiff alleged further that he, for the purpose aforesaid, did climb from the cab to the top of the tank, and, after having hoisted the apron, and adjusted the coal, attempted to climb back from the top of said tender into the cab, in order to start said engine, and move the same to the place to which, by the defendant's said foreman, he had been directed to return it. While plaintiff was climbing from the top of the tender into the cab of the engine, he was, as he alleged in his petition, thrown violently from the top of said tank or tender, a distance of 12 feet, to the ground, and seriously and permanently injured. The agencies which caused his being thus thrown were at considerable length described in the petition, and, summarized, are as follows: (1) The failure of the defendant to light the yards in the vicinity of the coal chutes; (2) the failure of defendant to provide plaintiff with a lantern or light of any kind; (3) the failure of defendant to provide any steps, holds, or other means by which

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plaintiff could safely climb from the top of the tank or tender to the floor of the cab, when so required to do in the performance of the work required of him ; (4) that defendant had knowingly and negligently permitted the iron strap, by which the tool box on the right side of said tank or tender was fastened and locked in its place to become broken and out of repair, and to stick up over the top of said tool box ; (5) that the work plaintiff was then performing was entirely outside his duties as a wiper, and a work he was not accustomed to perform, and that defendant neglected and failed to give plaintiff any instructions regarding the proper and safe manner of performing the work ; (6) that defendant should have required a hostler to run said engine to and from the coal chutes, and, if this had been done, it would not have been necessary for plaintiff to attempt to climb from the top of the tank to the floor of the cab at said time and place, but defendant carelessly and negligently failed to cause its engine hostler to run said engine to and from the coal chutes, but required plaintiff to do this in addition to the work of loading the tender with coal, thereby requiring the plaintiff to do the work of two men. In considering the evidence, we should bear in mind the fact that the jury found for the plaintiff, and that, from this circumstance, it is presumable that the testimony of plaintiff was accepted as true, rather than such as was in conflict therewith. The fifth and sixth of the above assignments of negligence should be rejected from consideration, for the reason that the injury complained of cannot, either upon the averments of the petition or upon plaintiff's own testimony, be attributed to the fact that plaintiff ran the engine to the coal chute, or to the fact that he was not accompanied by a hostler. The accident happened, according to his own theory, after the coal had been emptied from the chute into the tender, and while the engine was not in motion. Whether the movements of this engine while coming to the chute had been under the control of a hostler or of some other person was, there-

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fore, immaterial, for the injury was not attributed to the engine's movement, and we cannot consider the proposition that, if there had been a hostler in charge, the plaintiff might have done differently.

The other assignments of negligence may be grouped under three heads, of which the first was the failure to furnish proper light; the second was the failure to provide steps, holds, or other means by which plaintiff could safely climb from the top of the tank to the floor of the cab; and, third, that defendant knowingly permitted the strap on the tool box to become broken, and to project above the top of said box. There was no evidence that this strap was ever broken, but that the testimony of plaintiff was that he thought that in the darkness he stumbled upon it. What importance should be attached to the existence of this strap is, therefore, properly referable to the importance to be attached to the claim that there was an insufficiency of light and of means of furnishing light. There was no attempt to show that the tender could have been provided with steps, holds, or other means whereby plaintiff, with safety, might have descended from the top of the tender or tank to the floor of the cab. There is, therefore, to be considered but one general proposition, and that is the want of light to enable plaintiff from the top of the tank to reach the floor of the cab. This general proposition is divisible into two elements: the failure to light the yards and the failure to provide a lantern; but these need not be considered separately. From the averments of the petition it has already been made to appear that before the accident happened plaintiff had safely taken the engine to the chute, filled its tender with coal, and necessarily had gone to the top of the tank. He was provided with a torch, which, while he was filling the tender, rested on the cab of the engine. This torch was extinguished before plaintiff had completed the distribution of coal in the tender, and he was thereafter left in darkness to shovel the coal as best he could. He testified that, after he had put up the chute, he went to get his torch, and get down, and, in climbing

on the right-hand side of the tender he slipped on something, and fell to the frozen ground. After testifying as above, plaintiff was again interrogated concerning the accident, and testified as follows: "Q. How did it happen that you fell? A. Because I did not have any light to see with. Q. You stated something about stumbling. What did you say about that? A. I stumbled on something, I cannot tell what it was. Q. Where did you try to get down? A. I tried to get down on the side of the tender, and get down into the cab. Q. Whereabouts? A. Right on the top of the tool box. Q. Down at the end? A. Down at the end between the engine and the tender,—between the cab and the tender. Q. Was there any step there to get down? A. No, sir. Q. Well, did you look afterwards to see what you stumbled on? A. Yes. Q. What did you find there? A. I found a piece of strap iron sticking up on what is called the hitch, over the tool box. I could not tell whether it was that I stumbled on or not. Q. That is upon the top of the tank, is it? A. Yes, sir." On cross-examination plaintiff testified that he began to work for the defendant at Fairbury, in 1891, and since that date had been in its employ about half the time until the accident, and that much of the time he was in the employ of the company he was a wiper. Being recalled for cross-examination, plaintiff testified as follows: "Q. When you were up, and the light had gone out, you was going to state something, as I understood, about the wind. Do you remember what you were going to say? A. I remember now. I went to light the torch, but it was so windy I could not light it on top of the tender to see to get down by. Q. The whole tender was then filled with coal? A. Yes sir." On a further subsequent cross-examination plaintiff gave the following testimony: "Q. You stated you were on the tender when you fell? A. Yes, sir. Q. The tender was which way from the engine? A. The tender was east of the engine. Q. You was on the right-hand side of the tender? A. On the tender or the tank. Q. What part of the tank were you stand-

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ing on when you fell? A. On the tool box some place. Q. Near the tool box? A. On the top of it, or near it; I could not say positively. Q. You could not say whether you was on the top or near the tool box? A. No sir. Q. How wide a space do you think you walked on at that place? A. Well, I should judge it was a foot and a half. Q. What had been the width of the space you had walked on from the time you started to go * * * to get the torch? You said you walked some distance before you fell. A. I stumbled over the coal to get the torch; yes, sir. Q. How far had you been from the torch when you first started to get it? A. Perhaps to the back end of the tender. Q. That would be about how far, Mr. Felkner, as near as you can give it? A. In the neighborhood of six or eight feet. Q. And the space you was walking on was about how wide? A. Well, I could not say positively that I staggered on it at the further end. I climbed over the coal, and started to get my torch." The testimony of plaintiff with reference to the happening of the accident has been given with circumstantial minuteness, to show just how it was described by plaintiff himself. The substance of his testimony, we think, is correctly summarized in the following statement: He stopped the engine in such a position that the tender could be filled from the chute, and then, or before that time, placed his lighted torch on the top of the cab. While filling and arranging the coal in the tender, the torch was extinguished. Having finished the arrangement of the coal in the tender plaintiff attempted to walk, at first, perhaps, on the coal, but at any rate, when the accident happened, on the tank, from near the rear end of the tender, to the cab. This tank was about a foot and one-half in width, and on it there was a tool box, of which the top could be fastened down by means of a hasp. The theory of plaintiff was that he probably stumbled on this hasp and fell to the ground and was thereby seriously injured. There was no explanation by plaintiff as to why he failed to walk upon the coal instead of the tank, though he was examined on that subject. He admitted that he

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fully knew how the engine, the tender, and the tank were constructed, and how they were situated with reference to each other ; and yet that, of his own accord, he took the risk of being able, in the darkness, to walk on the tank, knowing, as he must have known, that in following the tank he must in some way get over the tool box resting upon it. This testimony was undisputed ; indeed, no person other than plaintiff was able to testify with relation to these particular matters. Though it is conceded, as plaintiff claims, that the foreman improperly required plaintiff to fill the tender lighted only by a torch, it would be a most violent assumption to suppose that this foreman was required to anticipate that, if his torch should be extinguished, plaintiff, in the darkness, would attempt the perilous feat which he admits was attempted by him. As a matter of fact, the injuries he sustained were, upon his own showing, attributable in a very large degree, if not entirely, to his own negligence. The judgment of the district court is therefore reversed. Reversed and remanded.

NOTE.

Injury to Employee—Contributory Negligence.—A servant having knowledge of danger about him must use diligence and care in protecting himself from harm. *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. Rep. 999.

And if he wilfully and imprudently encounters such danger the employer is, generally, not responsible for the injury caused thereby. *Johnson v. Chesapeake & O. R. Co.*, 38 W. Va. 206, 18 S. E. Rep. 573.

A person employed to work with or around dangerous machinery is bound to exercise his thinking faculties, and give careful attention as to how he passes around it; and if he failed to do so, and is injured in consequence, he is guilty of contributory negligence, which will prevent his recovery for such injury. *Stone v. Oregon City Mfg. Co.*, 4 Oreg. 52; *Hughes v. Winona & St. P. R. Co.*, 27 Minn. 137, 6 N. W. Rep. 553.

While there is an implied contract between employer and employee that the former shall provide suitable means, appliances, and instrumentalities with which to perform the labors required of the latter, and also that the latter shall be advised by the former of all dangers incident to the service of which the latter is not cognizant, yet the failure of the employer in this regard fur-

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nishes no excuse for the conduct of an employee who voluntarily incurs a known danger. *Simmons v. Chicago & T. R. Co.*, 18 Am. & Eng. R. Cas. 50, 110 Ill. 340.

Where the employment sought and accepted is dangerous, it is the duty of the employee to at least exercise reasonable and ordinary care to avoid injury. If the employment is a hazardous service, he is required to use very great precautions to avoid injury. *Union Pac. R. Co. v. Estes*, 37 Kan. 715, 16 Pac. Rep. 131; *Parker v. Georgia Pac. R. Co.*, 83 Ga. 539, 10 S. E. Rep. 233; *Lake Shore & M. S. R. Co. v. Roy*, 5 Ill. App. 82; *Chicago, B. & Q. R. Co. v. Avery*, 8 Ill. App. 133; *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa 52; *Taylor v. Missouri Pac. R. Co.*, (Mo.) 16 S. W. Rep. 206; *Shoner v. Pennsylvania Co.*, 130 Ind. 170, 28 N. E. Rep. 616, 29 N. E. Rep. 775; *Georgia R. & B. Co. v. McDade*, 59 Ga. 73; *Murphy v. New York C. & H. R. R. Co.*, 11 Daly (N. Y.) 122; *St. Louis & S. F. R. Co. v. McClain*, 80 Tex. 85, 15 S. W. Rep. 789.

A servant is under the same obligation to provide for his own safety from dangers of which he has notice, or might discover by the use of ordinary care, as a master is to provide it for him. *Wormell v. Maine C. R. Co.*, 31 Am. & Eng. R. Cas. 272, 79 Me. 397, 4 N. Eng. Rep. 692, 10 Atl. Rep. 49.

The servant of a railway company, to recover for a personal injury growing out of negligence of the company, must have used ordinary care on his part, considering his surroundings; that is, such care as a man of ordinary prudence would usually exercise under the same or like circumstances. *Wabash R. Co. v. Elliott*, 4 Am. & Eng. R. Cas. 651, 98 Ill. 481; *Schultz v. Chicago & N. W. R. Co.*, 44 Wis. 638, 18 Am. Ry. Rep. 146.

A railroad employee cannot recover for injuries received if his own negligence contributed in part to the injury. *Daub v. Northern Pac. R. Co.*, 18 Fed. Rep. 625; *Bauer v. St. Louis, I. M. & S. R. Co.*, 46 Ark. 388; *Slavin v. New York, N. H. & H. R. Co.*, 63 Conn. 573; *Central R. & B. Co. v. Kitchens*, 83 Ga. 83, 9 S. E. Rep. 827; *Chicago, B. & Q. R. Co. v. Merckes*, 36 Ill. App. 195.

Where the employee and the company were equally to blame for the injury, the company is not liable. *Indianapolis & C. R. Co. v. Love*, 10 Ind. 554; *Vicksburg & M. R. Co. v. Wilkins*, 47 Miss. 404; *Cornwall v. Charlotte, C. & A. R. Co.*, 97 N. Car. 11, 2 S. E. Rep. 659.

But this rule is subject to the qualification that contributory negligence will not defeat the action, if the defendant might, by the exercise of reasonable care and prudence, have avoided the consequence of the injured party's negligence. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679.

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Foss *et al.*

v.

OLD COLONY R. CO.

(*Supreme Judicial Court of Massachusetts, Jan. 8, 1898.*)

Death of Employee on Track—Contributory Negligence.*—Where the death of plaintiffs' intestate was the result of the negligent performance of his duty, he having either carelessly placed a signal light on the track itself instead of beside it, or displayed it longer than was proper, and having been killed by defendant's train while in the act of removing it, plaintiffs are not entitled to recover.

EXCEPTIONS by plaintiffs from Suffolk county superior court. *Overruled.*

John D. Long and *Wm. M. Stockbridge*, for plaintiffs.

Benson & Choate, for defendant.

LATHROP, J. The bill of exceptions refers to the pleadings, and, while no question of pleading is raised, we may briefly state the declaration, in order to ascertain the grounds upon which the plaintiffs seek to recover. This sets forth that William F. Foss was in the employ of the defendant as the station agent at Roslindale, on October 12, 1892, and as such it was his duty "to place on the track in front of the station, after a train had passed, a red lantern, as a signal to an approaching train that another train was just ahead, and as a warning to the engineer in charge of such approaching train to slacken his speed, and not to approach too near the train which had passed"; that it was his "further duty to remove said lantern about five minutes after the train ahead had passed; that on said October 12, 1892, at about 7 o'clock in the afternoon, said Foss had placed a red lantern on the track

*See preceding case, and note.

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in front of the station after a train had passed, and about five minutes thereafter went upon the track to remove said lantern"; and that, while removing it, he was struck by the locomotive engine of an approaching train, and was instantly killed. The declaration contains the usual allegations as to due care on the part of Foss, and negligence on the part of the servant of the defendant in charge of the locomotive engine, and other allegations as to notice and the dependence of the plaintiffs for support upon the earnings of Foss. From the exceptions it appears that the accident happened on the day above stated; that Foss was 38 years old, and had for 15 years been engaged in the railroad business, and was thoroughly familiar with the work, and with everything about a railroad. He had worked on two other roads, had been employed at three other stations of the defendant road, and came to Roslindale two days before the accident. The defendant's road at the Roslindale station runs about east and west, Boston being to the east and Dedham to the west. The station is on the northerly side of the tracks, and separated from it by a platform about 12 feet wide. There are two tracks; the one nearest the platform being at that time used by trains going to Boston, and the other by trains going to Dedham and beyond. The tracks passed the station in a long, sweeping curve, the station being on the inner side of the curve. The train by which Foss was struck was an express train, and came from beyond Dedham, and was due to pass Roslindale, without stopping, at 12 minutes after 7 p. m., on its way to Boston. The last train passing in the same direction was due to leave Roslindale at 2 minutes after 7. There were thus 10 minutes between the running time of the two trains. There was also another train, which left Roslindale for Dedham at 22 minutes after 7. Before the accident, a red light was seen in front of one of the doors of the station. One of the witnesses testified that "he could not say whether it was outside or in the center of the rails, but it was not on the platform." Another wit-

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ness testified that the light was on the track. The evidence as to the way Foss met his death is told by several witnesses. One Horton, who was going along South street, and passed under the gates after they were down for the approaching train to the north side, testified that he heard the whistle of the approaching train, and saw the red light, and stopped to see what was going to become of it; that he heard the train thundering along, and saw a man come to the bay window, look up, and turn quickly, and then heard the door slam; that he then saw him pass out of the door to the light, and stoop, "and then simply saw the red light wave a little, and that was all until the train passed." One Young testified that he went into the station about 10 minutes past 7, and heard a whistle; that he asked Foss if he should take in the lantern; that Foss at the time was in the ticket office, talking to a lady, who was standing at the window opening into the ladies' room; that 2 or 3 seconds later Foss came running out of the door, and down off the steps, and tried to "grab" the lantern. Another witness, who was on the platform of the station, testified that he saw Foss come suddenly out of the station, and dash down the steps to seize the light. He jumped down to the track, just picked the lantern up, and went to wheel to go back, and just as he turned he was struck. After the accident, Foss was found dead between the platform and the nearest rail, a space of between $2\frac{1}{2}$ and 3 feet. Some of the witnesses testified that they did not hear the whistle blown, and did not notice that the train slackened speed, though one witness testified that the steam was shut off.

The rules of the road which seem to us of importance are the following: "No. 75b. At stations (except where governed by the automatic block signals), upon the passing of every train, the red signal will be at once displayed next the track upon which the train has passed, and kept there until it has been gone the length of time given in the time table between it and the train that should follow, if not more than ten minutes, but

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in all cases kept there for five minutes; and no train will pass this signal until the five minutes shall have elapsed, unless otherwise ordered in the time table, or by special instructions. When stations are located upon a curve, however, a train, after stopping in this manner, will then proceed on to a straight line, there to wait the unexpired portion of the time." "No. 87. A train must not leave a station to follow another train until five minutes after the departure of such train, except where governed by the electric block signals, or where otherwise specified by time table. No. 88. Passenger trains running in the same direction must keep not less than five minutes apart, except where governed by the electric block signals, or where otherwise specified in the time table." There is also another rule, requiring ticket offices to be kept open at least 15 minutes before the arrival of each train. It was admitted that there were no electric block or automatic signals at the Roslindale station at the time of the accident. If we assume, without deciding, that there was sufficient evidence of negligence on the part of the person in charge of the approaching train to warrant the submission of this question to the jury, we are still of the opinion that on the evidence Foss lost his life through his own recklessness. The contention of the plaintiffs is that by rule 75b Foss was required to display the red signal upon the passing of the 2 minutes after 7 train, and keep it there 10 minutes, until the exact time when the express train was due; and that, therefore, he was killed while in the performance of his duty, and while engaged in doing what he was explicitly directed to do by the defendant. But we do not so interpret this rule. The first part of the rule might safely be applied when both trains were to stop at the station; but it could not apply where the second train was not to stop, but was to pass by. The words "but in all cases kept there for five minutes, and no train will pass this signal until the five minutes have elapsed," are also a part of the rule, and are applicable to the trains as they were then running. It is also to be noticed that there is nothing

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in the rules which forbids the placing of the red light upon the platform; and there is no evidence to show that the red light was usually placed between the track and the platform, or between the rails of the track, in one of which places the evidence tends to show that it was that night, or that it was usually placed between the two tracks, as the counsel for the plaintiffs contended that it was placed that night, which contention we do not find anything in the evidence to support. It seems to us that the only legal inferences to be drawn from the evidence are either that Foss unnecessarily placed the lantern in a dangerous place, or, if it were in a proper place, that he, through carelessness, did not remove it when he should have done so, and that then, suddenly awakening to the fact, he exposed himself, without just cause, to a manifest danger. It follows that the ruling of the court below was right. *Clark v. Railroad Co.*, 128 Mass. 1; *Young v. Railroad Co.*, 156 Mass. 178, 30 N. E. 560; *Tyler v. Railroad Co.*, 157 Mass. 336, 32 N. E. 227; *Connolly v. Railroad Co.*, 158 Mass. 8, 32 N. E. 937; *Rigg v. Railroad Co.*, 158 Mass. 309, 33 N. E. 512; *Sprow v. Railroad Co.*, 163 Mass. 330, 39 N. E. 1024; *Winslow v. Railroad Co.*, 165 Mass. 264, 42 N. E. 1133. Exceptions overruled.

GREENLEE

v.

SOUTHERN RY. CO.

(Supreme Court of North Carolina, May 26, 1898.)

Injury to Employee—Duty of Railroads to Use Self-couplers.*—It is negligence *per se* on the part of a railroad company to have other than self-couplers attached to its cars, and in an action by an employee for injuries received while coupling cars not provided with self-couplers, whether or not plaintiff was guilty of contributory negligence is immaterial.

*As to the Duty of Masters to Adopt New Appliances see *Shadford v. Ann Arbor St. Ry. Co.*, 6 Am. & Eng. R. Cas., N. S., 584, and *foot-note*.

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APPEAL by defendant from McDowell county superior court. *Affirmed.*

G. F. Bason, Chas. Price, and A. B. Andrews, Jr., for appellant.

E. J. Justice and John T. Perkins, for appellee.

CLARK, J. In any aspect of this case, the defendant is liable, whether the plaintiff was or was not guilty of contributory negligence; for the negligence of the defendant in not having self-couplers, and in not sending a man to couple cars at all, was a continuing negligence, which existed subsequent to the contributory negligence, if there had been any, of the plaintiff, and was the proximate cause—the *causa causans*—of the injury. Six years ago in *Mason v. Railroad Co.*, 111 N. C. 482, at page 487, 16 S. E. 698, at page 699, the court, in considering “whether the defendant company was negligent in failing to provide what is known as the Janney, or some improved coupler which would obviate the necessity under any circumstances of going between the ends of cars in order to fasten one to another,” said: “We think that the time has arrived when railroad companies should be required to attach such couplers * * * on all passenger cars. * * * and the new couplers have now become so cheap, as compared to the value of the lives and limbs of servants and passengers, that it is not unreasonable to require that they provide them on peril of answering for any damage which might have been obviated by their use.” While the court declined, on account of the expense, to hold that the same was true at that time as to freight cars, it added: “Doubtless, the day will soon come” when it would be negligence not to attach them to freight as well as passenger cars. Congress so thought, and passed an act (27 Stat. 531) requiring self-couplers and air brakes to be placed on all cars, freight as well as passenger, by January 1, 1898; and this had been complied with as to “over 60 per cent. of the freight cars,” besides nearly all passenger cars, operating in

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interstate commerce, by that date. In *Witsell v. Railway Co.*, 120 N. C. 557, 27 S. E. 125, the above citation from *Mason v. Railroad Co.* was approved, and the court held that, while it was not negligent to fail to provide the latest improved appliances, a railroad company was liable for any injury caused by the failure to use approved appliances that are in general use. The railroad companies have of late procured from the interstate commerce commission an extension, till January 1, 1900, of the time by which self-couplers should be placed upon all freight cars used in interstate service; but this was for their accommodation, and did not and could not relieve them from the legal liability incurred for injuries caused by their failure to provide "suitable appliances in general use" where the use of such would have prevented the injury. It only relieved them from the penalty provided in that act. The eleventh annual report (1897) of the interstate commerce commission, issued by authority of the United States government, and based upon the reports of the railroad companies themselves, show (page 80) that, of railroad employees (leaving out passengers altogether), 1,861 were killed and 29,969 were wounded in the year ending June 30, 1896, being greater loss than in many a battle of historic importance. Of the trainmen, this report (page 130) shows that nearly 1 in 9 had been killed or wounded that year,—total of over 17,000. Of these casualties, it is officially stated, 229 were killed and 8,457 were wounded in this single particular of coupling and uncoupling cars. As those figures are reported by the corporations themselves, it is not probable that they are overstated. If the railroads not reporting to the interstate commerce commission (because not engaged in interstate carrying) should be added, the figures of killed and wounded from this cause would doubtless be largely increased. By these figures, for the last year reported, nearly 9,000 men had been killed and wounded in coupling and uncoupling cars. As the corporations, on their own motion, or under compulsion of congressional action and judicial

decision, have adopted self-couplers on the passenger cars, and on "over 60 per cent." of the freight cars, it will be seen how many thousands of lives and bodies have been saved thereby; but that still nearly 9,000 men should in one year be killed or wounded "coupling and uncoupling" the freight cars which up to June 30, 1896, still require that duty, for lack of self-couplers, is the highest proof of the duty of the courts to enforce liability for failure to provide self-couplers in every case where an injury occurs from that cause. That nearly 9,000 men should still be killed and wounded in one year for failure to furnish appliances which are so widely in use, and which would entirely prevent such accidents, points out the duty of the courts.

In Witsell's Case, 120 N. C., at page 562, 27 S. E., at page 127, this court says: "If an appliance is such that the railroad should have it, the poverty of the company is no sufficient excuse for not having it." But in fact this defendant reports that this railroad has issued bonds and stocks for \$76,557 per mile. N. C. R. R. Com. Report, 1896, at page 246. This is presumed to have been paid in by its issuing the bonds and stocks, and hence it should be able to furnish appliances which will protect its employees from such injuries as this, and should be held liable for failure to do so, for the interstate commerce commission report shows the self-couplers can be added for \$18 per mile. In a large majority of the states, as well as by the federal government, railroad commissions have been created to supervise and regulate the charges and the conduct of these corporations. The courts will be very derelict in their duty if they do not enforce justice in favor of employees as well as the public. Six years ago this court said it would soon be negligence *per se* whenever an accident happened for lack of a self-coupler. Congress has enacted that self-couplers should be used. For their lack, this plaintiff was injured. It is true, the defendant replies that the plaintiff remained in its service knowing it did not have self-couplers. If that were a defense, no railroad company would ever be liable for

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failure to put in life-saving devices, and the need of bread would force employees to continue the annual sacrifice of thousands of men. But this is not the doctrine of "assumption of risk." That is a more reasonable doctrine, and is merely that when a particular machine is defective or injured, and the employee knowing it continues to use it, he assumes the risk. That doctrine has no application where the law requires the adoption of new devices to save life or limb (as self-couplers), and the employee, either ignorant of that fact, or expecting daily compliance with the law, continues in service with the appliances formerly in use. The defendant, after notice of six years from this court, and with notice of the act of congress, and also from the general adoption of self-couplers, that it should use them, was guilty of negligence in failing to do so. The injury to the plaintiff could not have occurred save for the failure of the defendant to comply with its duty in this regard, and the court below should have held it liable to the plaintiff upon the defendant's own evidence. Affirmed.

FURCHES, J. (dissenting). The plaintiff was an employee of the defendant company as a laborer in its yard, at its station in Asheville, and, while so employed, was injured by defendant, for which he brings this action. The yard was under the management and control of one Adams, under whom the plaintiff worked, and Adams had the right to discharge the plaintiff for disobedience of his orders. A part of the business of the plaintiff was to couple and uncouple cars, and, when he was employed, he was told he must not couple with his hands, but with a stick. At the time of the injury, Adams and his force, among whom was the plaintiff, were engaged in making up a train on a side track by taking cars off the main track, and putting them on the side track. This was done by what is called "kicking the cars"; that is, by pushing a car with the engine at the start, and then letting the car run by its own momentum. There had been two cars kicked down the track, and they had become stationary, and the

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plaintiff was injured when the third car was kicked down. The plaintiff contends that he was injured between the first and second cars kicked down, and the defendant contends that he was hurt between the second and third cars kicked down.

The plaintiff contends that he was injured in attempting to put in a coupling link, which could only be done with the hand; and the defendant contends that the plaintiff was hurt in attempting to make a coupling with his hand, instead of with a stick, as he was directed to do, and in this way contributed to his injury, and that this negligence was the proximate cause of the injury, and plaintiff cannot recover on that account. It was in the night (dark) when all this occurred, and the plaintiff had a lantern, and his theory is that, the second car being between him and the engine, he could not see the engine and the third car; that it was this third and last car kicked down the track, striking the second car, which caused it suddenly and violently to crash against the first car, that caused the injury; that Adams knew he was between these cars; that he had just before the injury told the plaintiff "to hurry up with coupling the cars on the side track, as train No. 44 was coming, and he wanted to get out of the way." The plaintiff offered other evidence besides his own tending to sustain his contention, and the defendant offered evidence to contradict the plaintiff,—to show that the injury of plaintiff was received between the second and third cars while attempting to effect a coupling with his hand, contrary to orders. And among other evidence introduced for this purpose was the testimony of Dr. Hilliard, who testified that he was the surgeon of the defendant, and was required by the company to examine—to poll—the plaintiff as to how he got hurt. And, if he got anything favorable to the company, we suppose he was to become a witness for it. This evidence was objected to by the plaintiff, but we think it competent, as declarations of the plaintiff, to be taken by the jury for what it was worth, considering the circumstances under which it was taken.

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The defendant contended that it was competent as a part of the *res gestæ*, and cited *Southerland v. Railroad Co.*, 106 N. C. 100, 11 S. E. 189, as authority for this position. *Southerland v. Railroad Co.*, is based upon entirely different principles. In that case it was as to what the engineer—a third person—said, and, of course, it was hearsay, unless it was a part of the *res gestæ*.

This appeal depends upon the charge of the court, upon prayers given and prayers refused, as there seems to have been no charge except what is contained in the prayers for instruction. It was important to determine the question whether the injury was received between the first and second cars, as plaintiff contended, or between the second car kicked down and the last car, as defendant contended. If between the first two cars, as contended by plaintiff, his theory is consistent, whether correct or not; while, if it occurred between the last two cars kicked down, his theory would appear to be inconsistent with his contention that he could not see the approaching car, as there would be no intervening car to prevent his seeing the approach of the last car, if he was hurt between the last two cars kicked down. It does not seem to us that the jury were sufficiently instructed as to this; and it also seems to us that there is too much said in plaintiff's prayer for instructions (which were given) about the pin not being in its proper place, and having to be hunted by the plaintiff, this not being supported by evidence in the case. There was no written contract between plaintiff and defendant that plaintiff should not couple cars with his hands. But it was in evidence and admitted by the plaintiff that, when he hired to the defendant, he was instructed never to couple cars with his hands. But the court was asked by the plaintiff to charge the jury that plaintiff had signed no written contract not to couple with his hands, and, this being so, the rule of the prudent man applies; that is, did the plaintiff act with ordinary prudence and care in attempting to make this couple, if he was making a coupling? and if he did, he would not be guilty of negligence. The

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court gave this instruction, and defendant excepted. In this there was error. There is no special virtue in contracts of this kind being in writing. There is no statute requiring them to be in writing, and it does not appear to us that this was a contract, but an instruction from Adams, the man who employed the plaintiff.

But the plaintiff contends that, whether it was a contract or an instruction, it was abrogated by Adams' saying to the plaintiff: "Hurry up with your coupling! No 44 is coming, and I want to get out of the way." If Adams said this, it does not revoke or tend to revoke the instruction before given "not to couple with his hands." *Mason v. Railroad Co.*, 114 N. C., on page 723, 19 S. E. 362. There is no evidence showing or tending to show that Adams knew or had reason to know that the plaintiff could not effect a coupling as quickly with his stick as with his hand. If plaintiff's contention were correct, it would be dangerous for a railroad "boss" to hurry up his hands, lest he abrogated all former orders and directions. This order was not inconsistent with the previous instruction, and does not fall within *Shadd v. Railroad Co.*, 116 N. C. 968, 21 S. E. 554; *Patton v. Railroad Co.*, 96 N. C. 456, 1 S. E. 863.

There were other exceptions discussed by counsel, but they will probably not arise on a new trial, and we do not discuss them. The plaintiff, by accepting service under the defendant to work in its yard in shifting and coupling cars, accepted all the ordinary risks of this service, without the special instruction not to couple with his hands. But it seems to us that, as a matter of economy, to say nothing of the suffering and loss of human life, railroads would be induced to get and use the more modern and safer appliances. They will have to do this soon, or answer for damages caused by the lack of them.

This was written as the opinion of the court; but, since it was written, the court has changed its opinion, and I file it as my dissenting opinion.

FAIRCLOTH, C. J., concurs with FURCHES, J.

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SNYDER *et al.*

v.

FT. MADISON ST. RY. CO.

(*Supreme Court of Iowa, May 10, 1898.*)

Abutters—Trolley Poles in Front of Premises—No Additional Servitude.*—An abutting lot owner cannot complain of the erection and maintenance of trolley poles in the street in front of his premises, if they are properly placed, and this is true whether he owns the fee of the street or not.

Same—Injunction—Sufficiency of Petition.—A petition for an injunction to compel defendant to remove a trolley pole, which avers that it was placed in front of plaintiffs' property without necessity, to annoy them, and to injure and depreciate the value of their property; that it is an obstruction to the enjoyment by them of their property; that it has depreciated the value of their property, and caused great damage to plaintiffs, and will continue to cause such depreciation and damage if not removed; and that they have not been compensated for the damages received, states ultimate facts, and is sufficient, it not being necessary for plaintiffs to resort to an action for damages.

APPEAL by plaintiff from Lee county district court.
Reversed.

T. B. Snyder, for appellants.

J. D. M. Hamilton, for appellee.

ROBINSON, J. The material facts alleged in the petition, and admitted by the demurrer, are as follows: The plaintiffs have owned and occupied as a homestead, since the 1st day of March, 1892, part of a lot and a dwelling house thereon situated on Broadway street, in the city of Ft. Madison. The lot is bounded on the west by that street, and the house fronts thereon, and on a public park, from which it is separated by the street. The streets, avenues, parks, and lots of the city were laid out and platted under

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*See *State v. Trenton Passenger Ry. Co.*, 4 Am. & Eng. R. Cas., N. S., 392, and *note p. 400 et seq.*

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and by virtue of an act of congress approved July 2, 1836, and an act amendatory thereof approved March 3, 1837, by the government of the United States, from which the title of the plaintiffs was derived. The defendant is a corporation organized under the laws of this state, and is engaged in operating a street railway, which is laid along Broadway street, in front of the premises of the plaintiffs. In the summer of the year 1895, electricity was substituted for the animal power which had been previously used to operate the railway. The trolley system was adopted, and, to aid in supporting the trolley wire, a pole 20 or more feet in height was placed in front of the dwelling of the plaintiffs, in that side of the street which was next to their lot. The petition alleges that the pole is an obstruction to the enjoyment by the plaintiffs of their homestead; that it is a nuisance; that there was no necessity for placing the pole where it is; that it could have been so placed that it would not have affected the plaintiffs seriously; that, before it was erected, the plaintiffs protested against its being placed where it now is, and since its erection have offered to pay to the defendant the cost of moving it to a point near the north line of their property, but that the offer was refused; and that they have been greatly damaged by the placing of the pole where it now is, and will sustain much damage in the future if it be not removed. The petition further states that the defendant has not caused the damage which the plaintiffs have suffered, and will suffer by reason of the erection of the pole to be assessed, nor has it compensated them for such damage. The plaintiffs ask for a mandatory injunction requiring the defendant to remove the pole from their property, and particularly from the front of their dwelling house; and they ask, further, that the defendant be perpetually enjoined from erecting or maintaining the pole in front of their dwelling, and for general equitable relief. The demurrer is based upon the ground that the petition does not state facts which entitle the plaintiffs to the relief they ask.

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1. The acts of congress under which the town of Ft. Madison was platted are found on pages 962—964 of the Revision of 1860. Those acts were considered in the case of *City of Dubuque v. Maloney*, 9 Iowa, 450, where it was held that the fee of the streets of a city platted and dedicated by virtue of those acts was, subject to the public easement, vested in the owners of the adjoining lots, and that the city had no right to use the streets for any purpose different from that for which they were originally designed. The same principle was approved in *Cook v. City of Burlington*, 30 Iowa, 94. In *Williams v. Carey*, 73 Iowa, 196, 34 N. W. 813, a distinction between cases when the fee to streets is in the abutting property owners and when it is in the city was noticed. It follows that the defendant in this case could not rightfully acquire from the city nor exercise rights in the street which were not authorized by the dedication of the streets, but are inconsistent with the easement granted to the public. Section 464 of the Code of 1873 gave to cities and towns power to authorize or forbid the location and laying down of tracks for street railways on all streets, alleys, and public places. See, also, *Damour v. Lyons City*, 44 Iowa, 276. It now appears to be settled that an ordinary surface street railway operated by animal power is not a new or additional burden upon the public easement in a street, but one which the right of the public to use the street authorizes for the purpose of facilitating public travel. *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267; *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515; *Hobart v. Railroad Co.*, 27 Wis. 194; *Texas & P. Ry. Co. v. Rosedale St. Ry. Co.*, 64 Tex. 80; *Elliott v. Railroad Co.*, 32 Conn. 579; *Carson v. Railroad Co.*, 35 Cal. 325; *Merrick v. Railroad Co. (N. C.)* 24 S. E. 667; *Cincinnati & S. G. Ave. St. Ry. Co. v. Village of Cumminsville*, 14 Ohio St. 523; *Brown v. Duplessis*, 14 La. Ann. 842; *Railroad Co. v. O'Daily*, 12 Ind. 551; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co. (Ill. Sup.)* 40 N. E. 1008; *Jaynes v. Railway Co. (Neb.)* 74 N. W. 67; *Booth, St. Ry. Law*, § 83.

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Streets are designed for public uses, among which are the construction and operation of street railways; and if they are so constructed and operated as not to affect prejudicially the rights of the public, nor to interfere with the proper use of the street by others, no burden not contemplated by the dedication of the street is placed upon it. In such cases the kind of power used in operating the railway is wholly immaterial. It is said, however, that the erection of trolley poles, and the placing of wires upon them, is a permanent obstruction of the street for the benefit of the street railway, which necessarily interferes with the proper use of the street by others. That poles and wires might be so erected and arranged as to have that effect is undoubtedly true, but the mere fact that the spaces they occupy cannot be used for other purposes does not show an improper use of the street. They are designed to aid in the rapid, convenient, and economical transportation of persons from place to place, and thus to facilitate the use of the street by the public for whom it was intended. It is true that some authorities hold that the erection and maintenance of poles in the streets do cast a burden upon the street which it was not intended to bear. *Jaynes v. Railway Co.*, *supra*, and cases therein cited. But the greater weight of authority appears to sustain the conclusion which we reach. *Taggart v. Railway Co.*, 16 R. I. 669, 19 Atl. 326; *Halsey v. Railway Co.*, 47 N. J. Eq. 380, 20 Atl. 859; *Lockhart v. Railway Co.* (Pa. Sup.) 21 Atl. 26; *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.* (Ky.) 23 S. W. 592; *Railway Co. v. Mills* (Mich.) 48 N. W. 1007; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.* (Ill. Sup.) 40 N. E. 1008; *Cumberland Telegraph & Telephone Co. v. United Electric Ry. Co.* (Tenn. Sup.) 29 S. W. 104; *Crossw. Electricity*, §§ 108, 109, 182, 183; *Booth, St. Ry. Law*, § 83. It follows from what we have said that an abutting lot owner has no sufficient ground to complain of the erection and maintenance of street railway poles in the street in front of his premises if they

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are properly placed, and this is true whether owns the fee of the street or not.

Our attention is called to section 1324 of the Code of 1873, as amended by chapter 104 of the Acts of the 19th General Assembly, which relates to the erection of telegraph and telephone poles along the highways of the state, and to section 1325 of the Code of 1873, which provides for the payment of damages caused by setting poles in private grounds, but we do not find anything in these sections to conflict with what we have said. It has been held in some cases that the erection of telegraph and telephone poles in streets imposes a new burden, because they do not in any manner aid in the use of the street by the public; but, as no question of that character is involved here, we refrain from expressing any opinion in regard to it.

2. It is the duty of a street-railway company to so construct and operate its railway as not to interfere unnecessarily with the right of abutting property owners to use and enjoy their property. *Cadle v. Railroad Co.*, 44 Iowa, 14; *Crossw. Electricity*, 85. A private individual may maintain an action for relief from injury to himself or his property if the injury be separate and distinct from that which affects the general public. *Churchill v. Water Co.*, 94 Iowa, 89, 62 N. W. 646. The petition in this case alleges, and the demurrer admits, that the plaintiffs have sustained serious injury from the placing and maintaining of the pole in its present location, and that the injury will continue if the pole be not removed. To show this more clearly, we set out somewhat more fully than we have already done the substance of averments contained in the petition. In addition to the platting of the town, the location of the property in question, and the adoption by the defendant of the trolley system, the petition alleges that the plaintiffs have, since the year 1892, owned and occupied as a homestead the premises described; that the defendant erected in that part of the street appurtenant to their property, and in front of their dwelling, a pole 20 or more feet in height, used

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in supporting its trolley wire, and similar poles at intervals on each side of the street; that the poles so erected were connected by cross wires to which the trolley wire was attached; that it was not necessary to place a pole in front of the plaintiff's dwelling house, nor on that part of the street appurtenant to their premises; that the pole on the opposite side of the street to which the one in question is attached is from four to six feet further north than is the one in question, and, had the latter been placed three feet further north than is the one to which it is attached, it would still have been in front of the plaintiffs' lot, but not at a place where it would have damaged the plaintiffs' premises to such an extent as to be complained of; that the pole in question is a nuisance and an obstruction to the enjoyment by the plaintiffs of their premises and homestead; that it was placed where it is, not because of any necessity, but to annoy the plaintiffs, and to injure and depreciate the value of their property, and that it had had that effect; that, before it was placed where it is, the plaintiffs protested against its erection there, and, after its erection, offered to pay the defendant the cost of moving it to a point near the north line of their property, where they would not object to it, but that the defendant declined to accept the offer; that the plaintiffs have been greatly damaged by the placing of the pole where it now is, and will continue to suffer such damage until it is removed; and that they have not been in any manner compensated for such damage. Some of the averments of the petition are immaterial, but we are required to determine whether a cause of action is stated in the petition. If it is, the immaterial matter and the statement of legal conclusions may be disregarded. Section 2646 of the Code of 1873 required the petition in a civil action to contain "a statement of the facts constituting the plaintiff's cause of action," and the petition was demurrable if the facts stated in the petition did not entitle the plaintiff to the relief demanded. Section 2648. It is well settled that, under these provisions, ultimate

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facts only, and not evidence of them, are to be stated in the petition. *De Lay v. Carney* (Iowa) 69 N. W. 1053; *Robinson v. Berkey* (Iowa) 69 N. W. 434. In *Luse v. City of Des Moines*, 22 Iowa, 590, it was said of a statement in the petition that the defendant "fixed and established a grade for Second street, as it was lawfully authorized to do"; that it was an averment of an ultimate fact; and that it was not necessary for the petition to show how the grade was established. In *Brown v. Kingsley*, 38 Iowa, 220 (an action for seduction), it was said that the ultimate fact was the fact of seduction, and that it was not necessary to state in the petition the "acts made use of to deceive and mislead," nor certain other facts, as they were merely evidence of the ultimate fact. In *Grinde v. Railroad Co.*, 42 Iowa, 376, a petition which alleged that the "defendant, by its agents and servants, did run and manage one of its engines in such a grossly negligent and careless manner that the same ran against and over" a cow of the plaintiff which had casually strayed upon the track of the defendant, was held to be sufficiently specific, and it was said: "It is not allowable to plead mere abstract conclusions of law, having no element of fact. They form no part of the allegations constituting a cause of action; but if they contain the elements also of a fact, construing the language in its ordinary meaning, then force and effect must be given to them as allegations of fact;" and that to plead more than the ultimate fact would be to plead the evidence, which is not allowable. See, also, *Byington v. Robertson*, 17 Iowa, 562; *O'Connor v. Railway Co.*, 83 Iowa, 105, 48 N. W. 1002; *Winter v. Railway Co.*, 80 Iowa, 443, 45 N. W. 737. Section 2655 of the Code of 1873 provided that an answer might contain "a statement of any new matter constituting a defense." In *Kendig v. Marble*, 55 Iowa, 386, 7 N. W. 630, which arose under that provision, the foreclosure of a mortgage on account of a judgment rendered by confession was asked. The answer alleged "that the confession of judgment was adopted as a fraudulent device, and

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is such to aid the plaintiff in evading the statute against usury, the plaintiff well knowing that the contract was usurious ; that this defendant believed, at the time of the execution of the same, it was only for the amount due, without usury, as before stated." It was held by this court that a sufficient defense was pleaded, and that if a conclusion of law, and not of fact, was set out, the answer should have been assailed by a motion for a more specific statement ; that, "if it was sufficiently explicit to enable the plaintiff to demur to it, there can be no doubt that it was fully understood and disclosed the defense intended to be made. This was all that could have been required upon the consideration of the demurrer."

The petition in this case states that the pole in question was placed in front of the property of the plaintiffs without necessity therefor, to annoy them, and to injure and depreciate the value of their property; that it is an obstruction to the enjoyment by them of their property ; that it has depreciated the value of that property, and caused great damage to the plaintiffs and will continue to cause such depreciation and damage if not removed ; and that they have not been compensated for the damages received. Applying the rule of the statutes and authorities cited, we conclude that the statements of the petition are of ultimate facts, which show a cause of action, although it may be true that a motion for a more specific statement as to the manner and extent of the obstruction and its effect might have been required had it been asked. But the ultimate fact was the unnecessary obstruction of the use and enjoyment of the plaintiffs' property to their substantial damage ; and that the petition showed. We do not understand the appellee to question this if it be true that the pole in question may have been so placed and maintained as to give to the plaintiffs a right of action. If the plaintiffs can prove the averments of their petition, they might recover damages for the injuries sustained ; but they are not compelled to resort to that remedy. If the location

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of the pole is not only injurious, but unnecessary, they may have recourse to this action for the removal of the pole. *Richards v. Holt*, 61 Iowa, 533, 16 N. W. 595; *Gribben v. Hansen*, 69 Iowa, 255, 28 N. W. 584; *Harbach v. Railway Co.*, 80 Iowa, 593, 44 N. W. 348.

We must not be understood as holding that a property owner may dictate the location of poles in front of his premises, nor that he may recover damages, however trivial, which may be caused by their location. The railway company has the right to so place its poles as to secure the best results for its railway, provided that it so places them as not to cause any unnecessary injury. The injurious consequences which it must guard against are those of a substantial character. The placing of poles in front of property is seldom desired by the property owner, and may in some slight degree interfere with the use of his property, as by obstructing the view from it; but for such injury alone he would rarely, if ever, be entitled to relief. The placing of a pole in a walk or roadway, however, or in front of and near to an important window, if the pole could as well be placed elsewhere, might afford ground for relief. But we cannot undertake to lay down general rules which would govern all cases. Each, of necessity, must be decided according to its own facts. It follows from what we have said that the district court erred in sustaining the demurrer, and its judgment is reversed.

DEEMER, C. J. (dissenting). I do not think the petition states a cause of action, and I dissent from the second paragraph of the opinion. I especially dissent from the doctrine that a pole placed in front of a window is a nuisance. The doctrine of ancient lights does not obtain in this state. I am authorized to say that WATERMAN, J., joins in this dissent.

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STATE *ex rel.* GRINSFELDER

v.

SPOKANE ST. RY. CO.

(Supreme Court of Washington, June 20, 1898.)

Application for Mandamus—Findings of Fact by Trial Court—Appeal.—The trial of the question whether or not an application by relator, an abutting owner, for a writ of *mandamus* to compel a street railway company to operate a line of their railway shall be granted is that of an action at law, and the findings of fact by the trial court will not be weighed by the supreme court.

Same—Right to Maintain Action—Demand.—A demand by relator upon the company for the operation of the line was not a condition precedent to his right to maintain such action.

Same—Same—Pecuniary Interest.—The relator, having improved his property adjacent to such line, while it was in operation, relying upon the facilities afforded by it, had sufficient individual interest to enable him to maintain such action.

Same—Duty of Street Railroads to Continue Operations.*—A railway company operating its road under a franchise from the state, is under obligations to the public not to abandon such operation, and *mandamus* will lie at the instance of an abutting owner to compel the company to perform its duty.

Same—Cases Cited.—The cases cited by appellant's counsel on such question are not in point.

Same—Abutters' Licensee—Undisturbed Possession.—The company cannot urge as a defense to such action that it occupies the streets upon which the relator's property abuts merely as the licensee of the abutting owners, it being in undisturbed possession of the streets, and the city being precluded by lapse of time (over five years) from objecting to such occupancy.

Same—Leased Lines of Lessee—Obligations.—And the fact that defendant is in possession of such line under a lease from another company is immaterial, defendant having covenanted to operate such line.

Streets—Conditional Dedication.—In platted additions to a town, when streets are laid out thereon, the fee belongs to the public; and if any condition is annexed to the dedication of streets therein, the condition falls, but the grant stands.

APPEAL by defendant from Spokane county superior court. *Affirmed.*

Thomas C. Griffith, for appellant.

Graves, Wolf & Graves, for respondent.

*See note at end of case.

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REAVIS, J. Application by relator for a writ of *mandamus* to compel the defendant, a street-railway company, to operate a line of street railway to Bell Park addition, in the city of Spokane. The alternative writ, founded on the affidavit of relator, was demurred to by the defendant, and, upon the overruling of the demurrer by the superior court, defendant answered denying some of the facts stated in the affidavit, and setting up new matter to which reply was made by relator. Upon the issues raised a trial was had before the court without the intervention of a jury and findings of fact made by the court. Defendant excepted to a number of the findings because not sustained by the evidence, but we find substantial evidence to sustain each finding of the court, and, as this is a law action, the findings of fact by the court have the same force and effect as a verdict of the jury, and this court cannot, therefore, weigh conflicting testimony in the case.

Application for
Mandamus—Find-
ings of Fact by
Trial Court—Ap-
peal.

The material facts found by the court are substantially that about the 17th of April, 1888, the Ross Park Street-Railway Company was incorporated under the laws of the state, for the purpose of constructing, equipping, operating, and maintaining a system of street railways in the city and county of Spokane, for the transportation of freight and passengers, such railways to be operated by steam, horses, or electricity, and likewise to borrow money, and to secure the payment of the same by mortgage on its property and franchises. That subsequent to the incorporation, and from time to time until the spring of 1892, the Ross Park Street-Railway Company, by building, leasing, and purchasing, operated a line of street railway commencing at the corner of Howard and Riverside avenues, in the city of Spokane; running thence along Howard street to Front street; thence on Front street to Olive street; thence east on Olive street to Hamilton street; thence north upon Hamilton street to Illinois avenue; thence east and northeasterly on Illinois avenue to C

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street; thence north on C street to diamond street; and thence east on Diamond street to the northeast corner of block 1 of Bell Park addition to Spokane. That all of the streets mentioned were within the corporate limits of Spokane, to and including C street, and the remainder of the streets were in platted additions to the city. The line of railway extends to the intersection of Illinois avenue and Hamilton street near a point known as Martha avenue, to the town of Hillyard. The Hillyard Line was built by a separate corporation, known as the "Arlington Heights Street-Railway Company." Subsequently, in the year 1894, the defendant, through a corporation known as the "Washington Water-Power Company," acquired control of all the lines of Ross Park Street-Railway Company and of the Arlington Heights Street-Railway Company, and operated the same thereafter, until May, 1897, as one system. At that date a sale was made of all the lines of the Ross Park Street-Railway Company by foreclosure of a mortgage executed to the Franklin Trust Company to secure payment of bonds, at which sale the Franklin Trust Company became a purchaser, buying all the property rights and franchises along the lines and appertaining thereto. On the same day a lease was executed by the Franklin Trust Company to defendant, by which the defendant covenanted to operate the said lines, and pay, as rent therefor, 100 per cent. of the gross earnings to the Washington Water-Power Company, the line of street railway running from Illinois avenue to the northeast corner of block 1, of Bell Park addition, being expressly mentioned and described in the lease, and being a portion of the line covenanted by the defendant in the lease to be by it run and operated. Thereupon defendant entered upon and continued under the lease to operate all the said lines of street railway until a few days before the commencement of this action, in December, 1897, when it discontinued that portion of the line from Illinois avenue to Bell Park addition. That at all times during the operation of these lines they were operated as one system, under one manage-

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ment, and passengers paid but one fare for the entire trip. In December, 1897, a short time before the commencement of this action, the defendant ceased to operate that portion of the railway line extending from the intersection of Illinois avenue and Hamilton street, at Martha street, to Bell Park, which in the findings of fact is designated as the "Minnehaha Park Line." Its poles, wires, and tracks were, however, left in the street, and have been left there ever since, and the defendant has declared no intention to remove the same or not to recommence the operation of the line at some future date. There are about 40 families living reasonably adjacent to the Minnehaha Park Line who are in the habit of using the same for street-car facilities. There were daily carried over this line from 80 to 120 people. A large number of these people have built houses there, improved their lands and yards, and taken up their residence there, because of the street-car facilities afforded by said line. The relator lives adjacent to this line, and several years ago commenced to reside there, and owns considerable property, which he has improved, relying upon the facilities afforded by this street-railway line. No franchise was ever granted by the authorities of the city or county of Spokane to the defendant, or any of its predecessors in interest, for the occupation of Hamilton street, C street, or Diamond street. At the time the line along Hamilton street was built Hamilton street was not within the city limits. In 1891 the addition within which lies Hamilton street was included within the limits of the city. C street and Diamond street have not yet been included in the corporate limits, but all the streets mentioned are within platted additions to the city of Spokane. Hamilton street was dedicated by the persons along the northeast addition to Ross Park addition, and in the dedication of the streets in that addition the dedicators reserved the exclusive right to lay street railways along the streets, and, prior to the building of the line, the defendant, or its predecessors in interest, received

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permission from the dedicators and owners of the property along the street to lay the same. Since Hamilton street has come within the city limits, the corporate authorities have not interfered with the occupation of the street by the railway company, and it has been in the undisputed use and occupation thereof. Along C street and Diamond street a like reservation was contained in the dedication of the additions through and along which these streets ran, but no permission has been obtained from the dedicators or the adjacent property owners by the street-railway company or its predecessors in interest to occupy said streets. It has, however, continuously occupied the same since 1892, and no objection has ever been made, so far as appears, by the county authorities, and at the time of ceasing to operate said line it was in undisturbed use and occupation of said streets. All of the Minnehaha Park Line and all of the Ross Park Line run along and upon public streets of the city of Spokane, and public streets of additions thereto, dedicated according to statute as public highways. The system operated by the defendant includes the major portion of the street-railway mileage in the city of Spokane. It is not found what is the actual cost of operating the Minnehaha Park Line. The court found that a half-hour service on the Minnehaha Park Line, run in connection with the Ross Park Line, is a reasonable operation of the road, and is such an operation as the company has maintained for a period of over five years. No demand was made by any person upon the defendant to continue or resume the operation of the line. Upon the findings of fact the superior court entered judgment awarding a peremptory writ of *mandamus* commanding the defendant to run and operate an electric car or cars on that portion of this road in the city of Spokane and additions mentioned and described in the findings of fact as the Minnehaha Park Line.

1. It is urged by the defendant, appellant here, that no demand having been made upon it to resume the

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operation of its line, the action cannot be maintained. It is true that, upon the necessity of a previous demand and refusal to perform the act which it is sought to coerce by *mandamus*, the authorities are not altogether reconcilable. MR. HIGH says: "The better doctrine, however, seems to be that which recognizes a distinction between duties of a public nature, or those which affect the public at large and duties of a merely private nature, affecting only the rights of individuals. And while in the latter class of cases, where the person aggrieved claims the immediate and personal benefit of the act or duty whose performance is sought, demand and refusal are held to be necessary as a condition precedent to relief by *mandamus*, in the former class, the duty being strictly of a public nature, not affecting individual interests, and there being no one specially empowered to demand its performance, there is no necessity for a literal demand and refusal. In such cases the law itself stands in lieu of a demand, and the omission to perform the required duty in place of a refusal." High, Extr. Rem. (2d Ed.) § 13. See, also, *Id.* § 41. In *Railroad Co. v. Hall*, 91 U. S. 343, there was under consideration an application by private parties to compel the Union Pacific Railroad Company to operate its line as one continuous system into the town of Council Bluffs, Iowa. It was urged that these parties could not lawfully be relators in the suit, but it should have been brought by the attorney general of the United States, or the district attorney of the district of Iowa, because the object of the suit was to compel the performance of a public duty. The court concludes: "There is, we think, a decided preponderance of American authority in favor of the doctrine that private persons may move for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law officer." In consonance with these views may be mentioned *State v. County Judge*, 7 Iowa, 186; *Virginia v. Rives*, 100

Same—Right to
Maintain Action—
Demand.

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U. S. 313; Attorney General v. Boston, 123 Mass. 460. In Northern Pac. R. Co. v. Territory, 3 Wash. 303, 13 Pac. 604, it was said by the court: "No demand for the facilities required was ever made upon the company. That a demand would be necessary, as a foundation of proceedings of this nature to establish a mere private right, is conceded; but it is claimed by appellee that this was a question of public right, and that the company was neglecting to perform a duty which it owed to the public, and that in such a case a demand was not necessary. We think this claim is established by the facts and law of this case." It may be noted that appellant did not deny that it had discontinued the operation of its street-railway line indefinitely. The rule which requires a demand to be made before application to the court for a writ of mandate is founded upon reason; that is, it is unjust that defendant should be subjected to the payment of costs for a failure of some duty which it was willing to perform had it been requested to do so. In Attorney General v. Boston, *supra*, the supreme court of Massachusetts said: "But where a municipal corporation or board has distinctly manifested its intention not to perform a definite public duty, clearly required of it by law, no demand is necessary before applying for the writ." The appellant's duty was a public one, due to the public, if due at all, and therefore falls within the rule announced by the best authority. Upon the facts found, it was not absolutely necessary for the relator to make a demand for the operation of the line.

2. It is also suggested that the relator has not such interest in the subject-matter of the action as will enable him to maintain the action. It is shown, however, he has a material individual interest in enforcing the performance of a duty to the public. Railroad Co. v. Hall, *supra*; Loader v. Railroad Co. (Sup.) 35 N. Y. Supp. 996; Canal Co. v. Shuman (Ga.) 17 S. E. 937.

3. It is maintained by appellant that the facts failed

Same—Same—
Pecuniary Inter-
est.

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to show any legal duty which it as a corporation is bound, either by law or its charter, to do or perform. The statute regulating *mandamus* in this state (Ballinger's Codes & St. § 5755) is as follows: "It may be issued by any court, except a justice's or a police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person." High, Extr. Rem. § 1, defines the writ as follows: "The modern writ of *mandamus* may be defined as a command issuing from a common-law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law." The controversy is whether, under the principles of the common law, a corporation authorized to transact the business which appellant is authorized to do, and which it has actually transacted, in the acquisition and operation of its street-railway lines, owes a duty to the public to continue the operation. The franchise was granted to appellant by the state, not for its profit alone or that of its stockholders, but in a large measure for the public benefit. Peculiar privileges were conferred upon it in consideration that it would provide facilities for communication and intercourse for the public. It is a common carrier. *Railroad Co. v. Winans*, 17 How. 30; *Booth, St. Ry. Law*, § 1; *Talcott v. Pine grove*, 23 Fed. Cas. 653. It was granted the power of eminent domain, a part of the sovereignty of the state, and, with the consent of the municipalities, it may lay its tracks over the public streets and highways. Such corporations, then, may

Same—Duty of
Street Railroads to
Continue Operations.

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not, by their own acts, disable themselves from performing the functions which were the consideration for the public grant. *Thomas v. Railroad Co.*, 101 U. S. 71. The opening of a highway or ferry, and the common carriage of persons or property over them, was at common law a franchise and a matter of governmental concern. It was a part of the subjects in immediate possession of the sovereign power, and to exercise which demanded a special grant or charter from the sovereign. Such avocations, in their nature and history, are unlike the private avocations of milling, hotel keeping, and traffic, which all may be pursued at pleasure, unless restrained by the exercise of police power. JUDGE KENT says in 3 Kent, Comm. p. 458, that there are certain franchises which are understood to be royal privileges in the hands of a subject. The right to set up a ferry or road, and the taking of tolls, is one of them, and in this the public has an interest. In 2 Bl. Comm. 37, it is said that a franchise is a branch of the royal prerogative in the hands of the subject, such as the right of taking toll for a bridge, way, or wharf. In *Prosser v. Wapello Co.*, 18 Iowa, 327, it was held by JUDGE DILLON that a public ferry franchise could only be conferred by the government, and must be founded on grant, license, or prescription. Ownership of the soil on each side of a stream does not confer the right to establish thereon without a grant a public ferry at which tolls are charged. These rights, then, are held by the grantee, the holder of the franchise, as the agent and trustee for the sovereign power, and are in no sense private, but continue after, as well as before, the grant to be but a portion of the public interest. The absolute commercial and business necessity for permanence when established forbade, from the earliest years, the manifest impolicy of leaving this interest to the laws of supply and demand, which thus far have sufficiently supplied the community with hotels, mills, etc. And it is not in degree only that these franchises differ from mills and inns. The one is private property; the other is a public function, which originally

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resided in the government, and, when delegated to either persons or corporations, still retains the public use. In *Gates v. Railroad Co.*, 53 Conn. 333, 5 Atl. 695, it was said: "One public right consists in the continuous uses of the railroad, its franchise and corporate property, in the manner and for the purposes contemplated by the terms of the charter. All these corporate franchises and this property are held subject to, and charged with, this obligation." In an early case, that of *Rex v. Railway Co.*, 2 Barn. & Ald. 646, a writ of *mandamus* was issued to compel the restoration of a tram road and the relaying of the track which the company had worn out. In *State v. Hartford & N. H. R. Co.*, 29 Conn. 538, a railroad company was incorporated to construct and operate a railroad for the transportation of passengers and freight between certain main points. The road was constructed, and thereafter it discontinued operating its trains to one of the termini. The court said: "We hardly know what doubtful principles of law are thought to be involved in the case. * * * All jurists and judges will at once agree that chartered companies are obliged fairly and fully to carry out the objects for which they are created, and that they can be compelled by *mandamus* to do it; and it will not be questioned that in the case of public highways, whether turnpikes or railroads, they are bound to keep them fit for use, and, in case of railroads, to keep them furnished with suitable cars, engines, and attendants, without which they could not be used at all." The supreme court of Maine, in *Railroad Com'rs v. Portland & O. Cent. R. Co.*, 63 Me. 269, compelled the erection and maintenance of a depot for freight and passengers upon a line of railroad. The supreme court of the United States in *Railroad Co. v. Hall*, *supra*, upon the relation of private parties by *mandamus*, compelled the Union Pacific Railroad Company to operate its road as a continuous line from Council Bluffs westward. In *City of Potwin Place v. Topeka Ry. Co.*, 33 Pac. 309, 51 Kan. 609, it was held

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that the performance of the duties which a street-railway company owes to the public may be enforced by *mandamus*. There lines of street railway were operated in connection with a system of railways in the city of Topeka, and then discontinued, when the law was invoked. In *San Antonio St. Ry. Co. v. State* (Tex. Civ. App.) 38 S. W. 54, the supreme court of Texas held that, where a street-railway company had undertaken the operation of its line upon certain streets, the public acquired a right to the operation of the lines which could be enforced by *mandamus*. It was also held that it was no defense to a writ of *mandamus* that a city might forfeit its franchise for failure to continue to operate its cars over a portion of the line; and it was further determined that an answer which set up that the operation of the line was a continual loss to defendant, that the revenues received were not sufficient to pay the actual expenses of its operation, and that if it continued the operation of the line the value of its whole property would be consumed and it would become bankrupt, was no defense, for the reason that, so long as it retained its franchise, it would not be allowed to urge, as an excuse for failure to perform the duties imposed by it, that it was nonprofitable. A similar principle is sustained with regard to a canal company in *Canal Co. v. Shuman*, *supra*, where a peremptory writ of *mandamus* was issued against a canal company requiring it to keep its canal in a navigable condition. It was also held that the answer of the defendant, that the operation of the canal was unprofitable, was no defense; that it could not retain its franchise and refuse to perform its duty. In *Haugen v. Water Co.*, 28 Pac. 244, 21 Or. 411, it was determined that a corporation formed for the purpose of supplying a city and its inhabitants with water, and which had laid its pipes in the streets of the city for that purpose, could be compelled by *mandamus* to supply persons living along the streets with water.

Counsel for appellant has called our attention to two

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cases to support the position that *mandamus* cannot be maintained here: One, *People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 8 N. E. 360. Same—Cases
Cited.

But the statute of New York provided that a peremptory writ of *mandamus* is only authorized, in the first instance, "where the applicant's right to a *mandamus* depends only upon questions of law." In that case the material averments of the petition of the attorney general were put in issue, and the facts were that a short line of road was abandoned where there was another line, only two miles longer, that accommodated the same public. The court said: "The present line [in operation] is a little longer than the one originally adopted, and slightly varying therefrom, but it accommodates the people of the state, and the people of the locality substantially as well as the line originally adopted. Suppose two roads were consolidated, and the lines of the two between two places were parallel and near to each other, could the consolidated road be compelled by *mandamus* to operate both lines, or could it discharge its duty to the public by using only one line?" And the court concluded that one only was sufficient in that case. The conclusion in no wise negatives the established principle of the public duty owed by the railroad company. The other authority is *State v. Canal & C. St. R. Co.*, 23 La. Ann. 333, which was an application for a writ of *mandamus* to compel the officers of a street-railway company to collect from subscribers to the capital stock of the corporation their delinquent subscriptions. The relators were stockholders. The defense was that the amounts to be paid and the times of payment were, by the charter and agreement signed by the relators, left to the discretion of the board of directors, and the provision was that "five per cent. of each subscription shall be payable at the signing of these articles, and the balance shall be paid at such times and in such amounts or installments as the board of directors may order." The court there held that, as a general rule, a writ of *mandamus* would not lie to compel an officer or a com-

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pany to do an act coming within the range of their duties, where the law or the charter under which they act has vested in them a discretion to do or not to do it. The case is clearly not in point here, for no discretion is vested by our laws in the charter of a street-railway company that would authorize its discontinuance of a street-railway line which it had already established and operated. Permanency in the service of the public in a reasonable manner is an essential duty in all such avocations.

4. But it is also urged by counsel for appellant that it had no grant or privilege or franchise from the city or county to operate its tracks upon the public streets, and was simply a licensee from the owners of the additions through which these streets ran. But it has continuously occupied these streets, since 1892, with its lines, and no objection has been made by the city or county authorities to such occupation, and it is in undisturbed use and occupation of these streets. The city could not object now. *Spokane St. Ry. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072. We do not think it can urge this objection so long as it is undisturbed in its use of the streets. We conclude that a corporation of the nature of appellant, receiving its franchises from the state and entering upon the enjoyment of them, cannot cease to perform the functions which were the consideration for the grant of such franchises without the consent of the granting power. The question of the public convenience is one which appeals to the discretion of the court. The distinction between a franchise granted by the state of the right to exist and engage in peculiarly favored operations, and upon which special and peculiar burdens are imposed, and the license granted by a municipality to such corporations to transact their business within its limits, was discussed by this court in a recent case. *Commercial Electric Light & Power Co. v. Tacoma*, 17 Wash. 661, 50 Pac. 592. It was there stated that an electrical company was a *quasi*

ame—Abutter's
Licensee—Undis-
turbed Possession.

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public corporation, and might not, without the consent of the state, disable itself from the performance of its public duties by transferring its corporate privileges and franchises, but that it might transfer to others the privilege granted by the municipal corporation to perform its business in the public streets within the limits of the city. See, also, *City of Bellville v. Citizens' Horse Ry. Co.*, 152 Ill. 171, 38 N. E. 584.

Same—Leased
Lines of Lessee—
Obligations.

In platted additions to a town, when streets are laid out thereon, the fee belongs to the public. 1 Ballinger's Codes & St. Wash. § 1276. Elliott, Roads & S. p. 87; *City of Des Moines v. Hall*, 24 Iowa, 234. If any condition is annexed to such dedication, the condition falls, but the grant stands. Elliott, Roads and S. pp. 88, 109, 110; *City of Des Moines v. Hall*, 24 Iowa, 241; *Richards v. Cincinnati*, 31 Ohio St. 506. The judgment of the superior court is affirmed.

Streets—Condi-
tional Dedication.

ANDERS and DUNBAR, JJ., concur.

NOTE.

Duty to Operate Road—Mandamus at The Instance of A Private Citizen.—See note 6 Am. & Eng. R. Cas., N. S., 667 *et seq.*

Private persons may, without the intervention of the government law officer, move for a *mandamus* to enforce the performance of a public duty not due to the government as such. *Union Pac. R. Co. v. Hall*, 91 U. S. 343, in which case MR. JUSTICE STRONG said: "The question raised by the objection, therefore, is whether a writ of *mandamus* to compel the performance of a public duty may be issued at the instance of a private relator. Clearly, in *England* it may. Tapping on *Mandamus*, p. 28, asserts the rule in that country to be that, 'In general, all those who are legally capable of bringing an action are also equally capable of applying to the court of King's Bench for the writ of *mandamus*.' This is true in all cases, it is believed, where the defendant owes a duty, in the performance of which the prosecutor has a peculiar interest; and it is equally true, we think, in case of applications to compel the performance of duties to the public by corporations. In *King v. Severn & Wye R. Co.*, 2 Barn. & Ad 646, a private individual, without any allegation of special injury to himself, obtained a rule upon the company to show cause why a *mandamus* should not issue commanding them to lay down again and maintain part of a railway which they had taken

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up. Under an act of Parliament, the railway was a public highway; and all persons were at liberty to pass and repass thereon, with wagons and other carriages, upon payment of the rates. What the prosecutor complained of was the loss by the public, and particularly by the owners of certain collieries (of which he does not appear to have been one), of the benefit of using the railway taken up. The writ was awarded. It was not even claimed that the intervention of the attorney-general was needed. Other cases to the same effect are numerous. *Clarke v. Leicestershire & Northamptonshire Union Canal Co.*, 6 Ad. & El. (N. S.) 898; 1 Chit. 700.

"There is, we think, a decided preponderance of *American* authority in favor of the doctrine that private persons may move for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law officer. *People v. Collins*, 19 Wend. (N. Y.) 56; *County of Pike v. State*, 11 Ill. 202; *Ottawa v. People*, 48 Ill. 233; *Hamilton v. State*, 3 Ind. 452; *Hall v. People*, 57 N. Y. 307; *People v. Halsey*, 37 N. Y. 344; *State v. County Judge of Marshall*, 7 Iowa, 186; *State v. Railway*, 33 N. J. Law, 110; *Watts v. Carroll Parish*, 11 La. Ann. 141. See also *Dillon on Mun. Corp.* § 695, and *High on Ex. Rem.* §§ 431, 432; *Cannon v. Janvier*, 3 Houst. (Del.) 27; *State v. Rahway*, 33 N. J. Law, 110. The principal reasons urged against the doctrine are that the writ is prerogative in its nature,—a reason which is of no force in this country, and no longer in *England*,—and that it exposes a defendant to be harassed with many suits. An answer to the latter objection is that granting the writ is discretionary with the court, and it may well be assumed that it will not be unnecessarily granted." See *High on Ex. Rem.* §§ 431, 433, for conflicting decisions on the question.

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v.

GREAT NORTHERN RY. CO.

(Supreme Court of North Dakota, April 9, 1898.)

Accident at Crossing—Negligence and Contributory Negligence—Question for Jury.—*Held*, that questions of negligence and contributory negligence were properly submitted to the jury.

Same—Lookouts.—*Bishop v. Railway Co.*, 62 N. W. 605, 4 N. D. 536, followed, as to obligation of railroad company to keep a lookout for persons and property at public crossings.

(Syllabus by the court.)

APPEAL by defendant from Ward county district court. *Affirmed*.

W. E. Dodge, for appellant.

James Johnson, for respondent.

*See note at end of case.

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CORLISS, C. J. Plaintiff has recovered a judgment for the value of his wagon, with its load of coal, which, it is undisputed, were destroyed by one of the defendant's freight trains at a railroad crossing.

Case Stated.

In answering the first point made by counsel for the defendant, that the highway had not been legally established it is only necessary to refer to a few facts in the case, and, in connection therewith, cite the previous decisions of this court. It is not denied that the crossing had been used by the public, as part of a public highway, for at least eight years before the accident. One of the witnesses testified that he had used it for a period of 14 years. The defendant had placed there the usual planking, and the jury were justified in finding that it had erected there a sign warning travelers upon the highway that there was a railroad crossing at that place. So far as the duty of the defendant to the public was concerned, the crossing was as much a public crossing as though the highway had been laid out in strict accordance with law. *Coulter v. Railway Co.*, 5 N. D. 568, 67 N. W. 1046. See, also, *Bishop v. Railway Co.*, 4 N. D. 540, 62 N. W. 605.

It is urged that the property was placed in the position of peril which it was in at the time of the collision through the plaintiff's own carelessness, and that, therefore, he cannot recover. He was drawing coal from his coalmine, a few miles west of Minot, in this state, to that city and was compelled to cross the railroad track at this point in order to reach the market for his fuel. While driving over the track, the axle of one of the wheels broke; and, before he was able to remove the wagon from the place of danger, it was struck by one of defendant's engines, and completely destroyed. It appears that the planks between the rails at this crossing had all been taken out, except one or two in the centre. This was done that there might be room for the flangers on the engine to operate inside of the rails; it being necessary to use the flangers for the purpose of keeping the snow away from the rails. But it appears that the flangers were only six inches

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wide, and yet the space between the inside of the rail on each side and the plank in the center of the track was considerably more than six inches. One witness said that the space was more than ten inches wide. But we need not dwell on this matter. We will assume, for the purposes of this case, that what the defendant did about removing the planking for the winter season was not a negligent act. Such act was not the proximate cause of the injury. The proximate cause was the negligence of the defendant's employees in charge of the engine drawing the freight train, in failing to discover the fact that the plaintiff's property was in a situation of peril on a public crossing in time to prevent a collision therewith. It is urged that plaintiff's wagon would not have broken down upon the track, and thus been placed in a situation where it could be struck by a passing train, had plaintiff not been careless, in attempting to drive over the track at this point with a loaded wagon. But there was no other crossing he could use, and it would be an extraordinary doctrine if a railroad company could, in effect, close up a highway, by making it dangerous at the point of intersection with its track; holding over the head of each traveler the penalty of being himself chargeable with responsibility for injuries occasioned by a condition of the highway created by itself. We do not think that plaintiff was, as a matter of law, guilty of contributory negligence in essaying to cross over the track with his loaded wagon. The question was for the jury, and their verdict was in his favor on this point. It matters not, however, whether plaintiff was placed in this predicament without any fault on his part, or because of his own carelessness. In either view of the case, it would be true that defendant owed him the duty of using reasonable care in keeping a lookout for persons and property near or upon this public crossing. Just such an accident as had occurred was one which might be anticipated by a reasonably prudent man. The defendant itself had, by removing the planking, thus leaving the rails four inches higher than the ground, created a condition

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at this very crossing which was likely to cause heavily loaded wagons to be stalled or broken down at that point. Could it nevertheless run its trains oblivious to such danger, and then escape the charge of negligence? We think not. There was evidence that those in charge of the engine could have seen the danger to plaintiff's wagon when the train was half a mile away. While it was still this distance from the crossing, a man who had been sent up the track by the plaintiff to signal the train to stop made efforts, by waving his hands and his hat, to warn the engineer and fireman of the danger. And yet, notwithstanding this fact, there is evidence that no whistle for brakes was sounded until the train was within about 250 feet of the crossing. It is true that there was evidence that the train could not have been stopped without running at least 1,600 feet. But it does not appear that if reasonable diligence had been used by the men in charge of the locomotive, in keeping a watch for obstructions at this crossing, they could not have discovered the peril to the wagon when more than 1,600 feet from the crossing, and therefore have discovered it in time to stop the train before it could reach the crossing. The law relating to the subject of the duties of railroads on approaching crossings was stated by this court in *Bishop v. Railroad Co.*, 4 N. D. 536, 62 N. W. 605, in the following language: "It follows that the trainmen, in approaching the crossing, were not at liberty to assume in advance that animals Same—Lookouts. would not be upon its tracks at the crossing. On the contrary, the fact that they were approaching a crossing devolved upon the men in charge of the train the duty of keeping a special lookout to avoid a collision with persons or animals that might be lawfully upon such crossing. The care should be commensurate with the danger to be reasonably apprehended. This general rule imposes upon railroads the duty of exercising exceptional care at all crossings, because upon a crossing there is greater reason than at other places to apprehend danger from collisions with persons and

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domestic animals." Applying this rule to the facts of this case, there can be no doubt about the duty of the court to submit the case to the jury, as it did. We have considered all the arguments and points made by counsel for the defendant, but do not deem them of sufficient importance to warrant a discussion of them in this opinion. Finding no error, the judgment of the district court is affirmed. All concur.

Accident at Crossing.

NOTE.

Lookouts at Crossings—Duty of Railroad Companies.—It is the duty of the engineer when his train is in motion to keep a constant lookout for obstructions, and when one is discerned, no matter when or where, he should promptly resort to all means within his power to avert the threatened danger. *Hilz v. Missouri Pac. R. Co.*, 101 Mo. 36; *Bullock v. Wilmington, etc., R. Co.*, 105 N. Car. 180, 42 Am. & Eng. R. Cas. 93; *East Tennessee, etc., R. Co. v. White, 5 Lea (Tenn.)* 540; *Railroad Co. v. Walker, 11 Heisk. (Tenn.)* 383; *Galveston City R. Co. v. Hewitt, 67 Tex. 473, 60 Am. Rep. 32*. See also *Chicago, etc., R. Co. v. Gomes, 46 Ill. App. 255*; *St. Louis, etc., R. Co. v. Lewis, 60 Ark. 409*; *St. Louis, etc., R. Co. v. Roberts, 56 Ark. 387*; *St. Louis Southwestern R. Co. v. Russell, 62 Ark. 182*; *Townley v. Chicago, etc., R. Co., 53 Wis. 626*; *Whalen v. Chicago, etc., R. Co., 75 Wis. 654*; *Memphis, etc., R. Co. v. Womack, 84 Ala. 149*.

Especially does this duty exist at public crossings, where, by virtue of the double user of the public and the railroad company, accidents are much more liable to occur. *Frazer v. South, etc., Alabama R. Co.*, 81 Ala. 185, 60 Am. Rep. 145; *Memphis, etc., R. Co. v. Womack, 84 Ala. 149*; *Ensley R. Co. v. Chewing, 93 Ala. 29*; *Savannah, etc., R. Co. v. Meadors, 95 Ala. 137*; *Louisville, etc., R. Co. v. Webb, 97 Ala. 308*; *St. Louis, etc., R. Co. v. Denty, 63 Ark. 177*; *Robinson v. Western Pac. R. Co.*, 48 Cal. 409; *Clampit v. Chicago, etc., R. Co., 84 Iowa 71, 49 Am. & Eng. R. Cas. 468*; *Kansas Pac. R. Co. v. Pointer, 14 Kan. 37*; *Purinton v. Maine Cent. R. Co.*, 78 Me. 569; *Cooper v. Lake Shore, etc., R. Co.*, 66 Mich. 261, 11 Am. St. Rep. 482; *Marcott v. Marquette, etc., R. Co.*, 47 Mich. 1, 4 Am. & Eng. R. Cas. 548; *Battishill v. Humphreys, 64 Mich. 494, 28 Am. & Eng. R. Cas. 597*; *Kelly v. Duluth, etc., R. Co.*, 92 Mich. 19; *Johnson v. St. Paul, etc., R. Co.*, 31 Minn. 283, 15 Am. & Eng. R. Cas. 467; *Frick v. St. Louis, etc., R. Co.*, 75 Mo. 595, 8 Am. & Eng. R. Cas. 280; *Halferty v. Wabash, etc., R. Co.*, 82 Mo. 90; *Cheney v. New York Cent., etc., R. Co.*, 16 Hun (N. Y.) 415; *Texas, etc., R. Co. v. Lowry, 61 Tex. 149*; *Heddles v. Chicago, etc., R. Co.*, 74 Wis. 239, 39 Am. & Eng. R. Cas. 645; *Hollinger v. Canadian Pac. R. Co.*, 21 Ont. Rep. 705.

The lookout must exercise ordinary care, and if he fails to discover the peril of persons at the crossing when reasonable attention would have enabled him to do so in time to have prevented

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the injury, the company will be held liable. *East Tennessee, etc., R. Co. v. White*, 5 Lea (Tenn.) 540, 8 Am. & Eng. R. Cas. 65; *Gulf, etc., R. Co. v. Pendery*, (Tex. Civ. App. 1896) 36 S. W. Rep. 793.

The Tennessee Statute (§§ 1166-1168) has been construed to mean that some person shall be so situated on the lookout that he can see ahead. If the engineer cannot see, the fireman must, and if the fireman cannot, the engineer must. *Nashville, etc., R. Co. v. Nowlin*, 1 Lea (Tenn.) 523.

SCHNEIDER

v.

CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Wisconsin, May 3, 1898.*)

Accident at Railroad Crossing—Contributory Negligence—Signals and Excessive Speed.*—The driver of a noisy vehicle knowing that a train is about due at a crossing is guilty of negligence if he attempts to cross without looking for the train after having driven the last 80 feet with the rear of his vehicle turned in the direction from which he knows that the train is approaching, and without looking for the train, and such contributory negligence will prevent recovery in an action for injuries inflicted by the train while he was making such attempt even though defendant failed to give the proper signals, and was running the train at an excessive rate of speed, the fact that the law of Wisconsin makes railway companies liable to any person injured for all damages caused by the excessive speed of trains within city limits not precluding the defense of contributory negligence in actions for such injuries.

Proximate Cause—Erroneous Definition of.—It was error to charge that: " 'Proximate cause' means this: It means a moving cause, or an immediate or direct cause to the remote cause. And the question is, was the defendant guilty of negligence that was the proximate cause of the plaintiff's injury?"

APPEAL by defendant from Winnebago county circuit court. *Reversed.*

H. H. Field, Barbers & Beglinger, and Geo. R. Peck, for appellant.

Eaton & Weed and Bouck & Hilton, for respondent.

*See *State v. Cumberland & P. R. Co.*, 10 Am. & Eng. R. Cas., N. S., 511, and *note*, p. 518.

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CASSODAY, C. J. This action is to recover damages sustained by the plaintiff, November 26, 1895, while driving a milk wagon on Ninth Street, across the defendant's main track, about a mile and a quarter southwesterly from the defendant's depot in Oshkosh. Issue being joined, and trial had, the jury returned a special verdict to the effect (1) that the defendant was guilty of negligence which was the proximate cause of the plaintiff's injury; (2) that the plaintiff was not guilty of negligence which contributed proximately to the injury; (3) that the plaintiff did stop and look northeasterly along the railroad track, and listen for a train, at the place on the street marked "C" on the plaintiff's map; (4) that the bell was not ringing as the train approached and passed over the Ninth street crossing; (5) that the whistle was not blown for the Sixth street crossing at or near the whistling post for that crossing; (6) that the whistle was not blown for the Ninth street crossing at or near the whistling post for that crossing; (7) that the train was running, at the time it approached the Ninth street crossing, at the rate of 25 miles per hour; (8) that the plaintiff's damages were assessed at \$6,000. Upon such verdict the court ordered judgment in favor of the plaintiff for the amount stated. From the judgment entered thereon accordingly the defendant brings this appeal.

It appears from the evidence, and is, in effect, undisputed, that Ninth street is 60 feet wide, and runs east and west through Oshkosh; that the track of the defendant's main line, with a right of way 66 feet wide, runs in a southwesterly and northeasterly direction through the city, and crosses Ninth street at a point about 350 feet west of Idaho street, making an acute angle of about 34 deg. between the southeast line of the railway and the north line of Ninth street; that on the southeast side of the railroad track, and on the north side of Ninth street, at the time of the accident, there were many houses, barns, buildings, and trees, with occasional vacant lots, and Idaho street; that the

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first street east of the place in question, intersecting Ninth street, and running north, is Idaho street; that about 750 feet east of Idaho street, and parallel with it, is Dakota street, running north from Ninth street; that about 900 feet east from Dakota street and parallel with it, is Ohio street; that about 700 feet north of Ninth street, and parallel with it, is Sixth street; that the railroad crosses that street about 1,250 feet northeasterly from the place in question; that a sewer had been built along the center of Ninth street a few months before the injury, and, when completed and covered, there was left a ridge of earth on the top, a few inches high, which had turned the travel by team on the north half of the street, where the plaintiff was driving as he approached the crossing; that this sewer terminated at a covered manhole, marked "B" on the map, 10 feet from the east rail at the crossing; that point C, mentioned in the verdict, was pointed out to the plaintiff's witness Finch, a surveyor and civil engineer, by the plaintiff, June 1, 1897, the day before the commencement of the trial, and more than 18 months after the injury, and is $78\frac{1}{2}$ feet from the manhole mentioned, measured along the traveled course (that is to say, $88\frac{1}{2}$ feet from the southeast rail at the crossing); that the traveled track of that street from point C to the crossing was substantially smooth and level at the time; that the plaintiff was a farmer at the time, 26 years of age, and lived 5 miles west of the city, and had been engaged in peddling milk in Oshkosh for 5 years, and usually drove home westerly along Ninth street in a covered milk wagon drawn by a team of horses, one 5 years old, spirited, and afraid of the cars; that the other was older, but with similar disposition; that the wagon contained several milk cans, three kegs of beer, a stove, a raffling outfit, a wheel of fortune, and other articles which made more or less noise as the wagon passed along the frozen ground, of the street; that it was an ordinary milk wagon (low wheels in front, and high wheels behind) for the delivery of goods in the city; that it could be

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turned short; that the box stood $3\frac{1}{2}$ to 4 feet from the ground; that the seat was about a foot high above the box, and 3 feet from the front end of the box; that there was a window in the door; that the glass did not extend from the top of the cover down to the bottom of the box; that the wagon was of wood frame, covered with canvas; that the canvas extended about 3 feet up from the box; that the plaintiff's head was about 2 inches from the top of the wagon; that there was a door on both sides and in front of the seat, and about 18 or 20 inches wide, with glass at the top end of the door, 14 by 17 inches in size; that the plaintiff did not talk with Bartlett after leaving Idaho street; that he was familiar with these streets and this locality, and had been for about 6 years; that about half a mile east of the place in question the plaintiff and his companion, Bartlett, stopped at a saloon and drank some beer, and then started for the plaintiff's home; that when they reached Idaho street the plaintiff stopped his team, opened the door, looked north, and listened, to see if a train was coming, but neither saw nor heard any; that he then drove on west about 250 feet, to point C, mentioned in the verdict, 98 feet southward from the most westerly extremity of the red barn, immediately southeast of the defendant's right of way, which was the last building to intercept his view down the track towards the northeast; that from that point he could see the whistling post, a distance of 725 feet northeast of the crossing; that at that point, C, the plaintiff, with Bartlett sitting on his left, looked northeast out of the door, and listened for an approaching train; that none was in sight, and he heard no signals; that he was then within 40 feet from the railroad track, at right angles from it, and $88\frac{1}{2}$ feet, along the course he traveled, to the southeast rail of the track; that when he reached the southeast line of the defendant's right of way, which was $62\frac{1}{2}$ feet from the nearest rail, he could have seen down the track to the northeast, had he looked, for 2,295 feet, but that he did not look, and did not hear any bell ring nor whistle sound;

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that he drove from point C, in a southwesterly direction, at a rate of about $3\frac{1}{2}$ to 5 miles per hour, leaving the door of his vehicle open, so as to hear a train, or the signals of a train, if any; that the first thing he "knew of a train was three toots of the whistle, when the engine struck" the vehicle, and the injury occurred; that at that time the plaintiff's horses were frightened, and standing on their hind legs; that it was a cold day, with the wind pretty nearly from the west; that Ninth street was substantially level each way from the crossing; that there was nothing to obstruct the view along the defendant's right of way to the southwest for a considerable distance; that the collision occurred about 3:55 o'clock p. m.; that the train left the depot in Oshkosh at 3:40 p. m.; that the fireman testified that he rang the bell and looked ahead as he approached the crossing; that the sun was shining at the time directly in his eyes, which, with the snow on the ground, made it difficult for him to distinguish objects at a distance; that he did not see the team and wagon until the engine was right on the crossing; and he was corroborated by other testimony, but the plaintiff's rebutting testimony was to the effect that the sun was not shining at the time, and that it was cloudy.

For the purposes of this appeal, we assume, as found by the jury, that the train in question was at the time going at the rate of 25 miles per hour; that it did not ring the bell as it approached and passed over the Ninth street crossing, and that it did not blow the whistle at or near the whistling post for the Sixth street crossing, nor for the Ninth street crossing; and, hence, that the defendant was negligent. As stated by the learned trial judge, the main and controlling question in this case is whether the plaintiff was guilty of contributory negligence, in failing to look in the direction of the coming train after leaving point C. He regarded the question as a close one when he submitted it to the jury, and, after hearing the arguments for a new trial, concluded that it ought to be settled by

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gence—Signals and
Excessive Speed.

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this court. At point C, the traveled track which the plaintiff followed turned from the north side of the street to a point at or very near the center of the street at the place of crossing the railway track, thus reducing the angle between such traveled track and the railway track from 34 deg. to about 22 deg. The result was that in driving from point C to the point of collision, a distance of over 80 feet, the rear of the plaintiff's vehicle was towards the coming train. When the plaintiff stopped at point C, he had not reached the defendant's right of way; and his view in the direction of the coming train was necessarily obstructed by the red barn mentioned, so that he could only see down the track 44 rods. Had he looked again, or in the first instance, when he had gone 26 feet nearer (that is to say, when he was $62\frac{1}{2}$ feet from the track by the line of travel), he could have seen down the track for a distance of 139 rods, and necessarily would have seen the train, and all would have been well. The plaintiff had stopped on Ninth street, at Negal's,—half a mile east of the place of collision,—about 3:30 p. m. That was 10 minutes before the time for the train to start from the depot in Oshkosh. At that point he was only about 90 rods from the railway track. As he advanced towards the crossing, he constantly came nearer and nearer to the railway track. At Dakota street, about 70 rods east of the crossing, he was only about 40 rods from the railway track. At Idaho street, he was only about 15 rods from the railway track. He was familiar with the time of the train, and so at that point stopped and looked and listened. He necessarily knew that it had not yet passed. It was that conviction that made him stop and look and listen at point C. As he could only see down the railway track for a distance of 44 rods, by reason of his view being partially obstructed by the red barn, can we say that he was in the exercise of ordinary diligence and care in driving from that point to the railway track, a distance of more than 80 feet, in a vehicle containing noisy implements, surrounded by canvas, and with the rear

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end of it towards the expected train, without stopping once to look or listen? We are clearly of the opinion that he was guilty of contributory negligence. The railway track was there for the purpose of running trains over it, and they were liable to pass at any moment. Even strangers were bound to know that fact,—much more, the plaintiff. He was bound to increase his vigilance as he approached the crossing. *Haetsch v. Railway Co.*, 87 Wis. 304, 58 N. W. 393; *Nelson v. Railway Co.*, 88 Wis. 396, 60 N. W. 703; *Schlingen v. Railway Co.*, 90 Wis. 194, 62 N. W. 1045. To look when he was behind, or partially behind, some building, was no excuse for not looking when he reached the right of way, where he would have had an unobstructed view of the railway track for a distance of 139 rods. The case is ruled by numerous adjudications in this court, only a few of which will here be cited: *Williams v. Railway Co.*, 64 Wis. 1, 24 N. W. 422; *Schilling v. Railway Co.*, 71 Wis. 255, 37 N. W. 414, and 40 N. W. 616; *Seefeld v. Railway Co.*, 67 Wis. 96, 29 N. W. 904; *Hansen v. Railway Co.*, 83 Wis. 631, 53 N. W. 909; *Schmolze v. Railway Co.*, 83 Wis. 659, 53 N. W. 743, and 54 N. W. 106; *McKinney v. Railway Co.*, 87 Wis. 282, 58 N. W. 386; *Groesbeck v. Railway Co.*, 93 Wis. 505, 67 N. W. 1120. The case of *Piper v. Railway Co.*, 77 Wis. 247, 46 N. W. 165, seemingly relied upon by counsel, is broadly distinguishable in its facts. In that case the plaintiff stopped and looked and listened after reaching the defendant's right of way, and when within between 50 or 60 feet of the railway track, and at a point where he could see along the track, in the direction of the coming train, at least 900 feet; and, besides, his attention was forced away from further looking by the conduct of his team. It was not the case of mere inadvertance or inattention, which is necessarily inexcusable in one approaching a railway track upon which a train is liable to pass at any moment, and hence is a known place of danger. What is there said about a person approaching a railway crossing, assuming that the train

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is moving at a lawful rate of speed, when "nothing appears to the contrary," has reference to the facts present in that case, and the facts present in *Langhoff v. Railroad Co.*, 19 Wis. 489, and similar cases. But, when the *Langhoff Case* came before this court the second time, it appeared that the deceased must have seen and known of the two approaching trains, and, hence, that no such assumption could be indulged. *Langhoff v. Railway Co.*, 23 Wis. 43. To the same effect, *Chase v. Railroad Co.*, 167 Mass. 383. 45 N. E. 911. Certainly, the principle has no application to the case at bar, where the plaintiff might have seen, but neglected to look. The second finding of the jury, to the effect that the plaintiff was not guilty of contributory negligence, is contrary to the undisputed evidence; and hence a nonsuit should have been granted, or a verdict directed in favor of the defendant.

2. Counsel contends that, because the statute makes railway corporations liable to any person injured for all damages caused by trains running at an excessive rate of speed in cities, such liability is absolute, and cannot be defeated, even by the plaintiff's contributory negligence. Laws 1891, c. 467. The precise question has not been expressly decided by this court, although that statute has been mentioned in cases. *Nolan v. Railway Co.*, 91 Wis. 21-24, 64 N. W. 319; *Wickham v. Railroad Co.*, 95 Wis. 26, 69 N. W. 982. Since that enactment, however, a number of cases have been decided by this court in which contributory negligence was held to defeat the action, notwithstanding the train was running at an excessive rate of speed in a village or a city. This was so in *Groesbeck v. Railroad Co.*, 93 Wis. 505, 67 N. W. 1120, cited by the defendant's counsel. In that case the learned counsel for the plaintiff did not insist upon that statute in his oral argument, although they did cite the statute and make the point in their brief, and the question was, in effect, decided. In view of the numerous adjudications of this court upon statutes creating a liability in language just as emphatic as in the statute in question,

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it is very manifest that contributory negligence in the case at bar is a complete defense. Such is the statute creating a liability for "insufficiency or want of repair" of a public highway or street. Rev. St. §§ 1339, 1347. So the original statute making railroad companies liable for all damages sustained by failure to fence the right of way was held not to bar contributory negligence. Laws 1872, c. 119, § 30; Sanb. & B. Ann. St. § 1810; Curry v. Railway Co., 43 Wis. 665, 683. The same rule applies to the liability created by statute for failure to guard or block the frogs in railway tracks. Laws 1889, c. 123; Sanb. & B. Ann. St. § 1809a; Holum v. Railway Co., 80 Wis. 299, 50 N. W. 99; Dugan v. Railway Co., 85 Wis. 614, 55 N. W. 894. The same rule was applied to the statutory liability for not guarding dangerous machinery. Thompson v. Edward P. Allis Co., 89 Wis. 523, 62 N. W. 527. We must hold that the defendant is not barred from the defense of contributory negligence by the statute cited.

3. Error is assigned because the court charged the jury that: "'Proximate Cause' means this; It means a moving cause, or an immediate or direct cause to the remote cause. And the question is, was the defendant guilty of negligence that was the proximate cause of the plaintiff's injury?" This was error, under numerous and recent decisions of this court. Davis v. Railway Co., 93 Wis. 470-484, 67 N. W. 16, 1132; Andrews v. Railway Co., 71 N. W. 372; Deisenrieter v. Malting Co., 72 N. W. 737, 738; McFarlane v. Town of Sullivan, 74 N. W. 559. Under the peculiar facts in this case, the error might not, of itself, work a reversal. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

Proximate Cause—
Erroneous Definition of.

Stahl v. Lake Shore & M. S. Ry. Co

STAHL

v.

LAKE SHORE & M. S. RY. CO.

(Supreme Court of Michigan, June 7, 1898.)

Accident at Crossing—Unmanageable Team—Proximate Cause.*—Plaintiff while within 55 feet of a railroad crossing saw the train approaching, and might have stopped his team to avoid injury had not his horses become frightened and run in front of the train. There was some evidence to show that the proper signals were not given, and that the train was running at an excessive rate of speed. *Held*, that the fright of the horses, which plaintiff should have anticipated, was the proximate cause of the accident.

Error by defendant to Monroe county circuit court.
Reversed.

C. E. Weaver (*Geo. C. Greene* and *O. G. Getzen-Danner*, of counsel), for appellant.

Charles H. Golden and *Edward R. Gilday* for appellee.

MONTGOMERY, J. Plaintiff recovered a verdict in an action for damages sustained in a collision. The collision occurred at the crossing of the defendant's road at Third street, in the city of Monroe. Plaintiff was engaged in hauling gravel; had drawn one load, and unloaded it, and was going back after another. He had a team that weighed about 2,700 pounds, and a new, heavy wagon. The train with which the collision occurred was a passenger train, and was substantially on time. The plaintiff testified that, when he looked at his watch, he thought the train must have gone west. Hubbel street is one block from the railroad crossing, and plaintiff testified that, before reaching Hubbel street, he brought his team down to a walk; that he looked out for a train, but did not see any. There were some obstructions in the way of a clear view, but at a

*See note, 5 Am. & Eng. R. Cas., N. S., at p. 296 § 2.

point 60 feet from the crossing he could have seen a distance of 275 feet, and at a point 46 feet from the crossing he had an unobstructed view for 672 feet. The plaintiff testified that, when he was 55 feet from the track, the team became frightened, and that at this point he saw the engine and train coming; that, as soon as he saw it, he pulled back on the horses, and hallooed, "Whoa;" that he braced his feet against the end boards, but did not get a new hold of his reins; that both horses jumped on the track at the same time, and were running away before they had got over the track. He testified, further, that, in approaching the track, the team just went as they were a mind to,—took their own gait; that the way that he had the lines did not affect their speed one way or the other; just held a common line on them; that, if he wanted to stop them, he would have had a stronger hold than he did have; that he did not have a chance to do this; that he was leaning back, and pulling. He further testified on cross-examination that there would have been nothing to prevent his turning around when he got up as far as the sign, "Railroad Crossing." There was some testimony tending to show that the train was coming at a rate of speed somewhat in excess of that provided by an ordinance of the city, and also some testimony to show that the signals were not given. Assuming the defendant to have been negligent in the particulars named, this negligence did not relieve the plaintiff from the exercise of due care in approaching the crossing. He was still bound to use his senses to avoid a collision with the train. The plaintiff's own testimony shows that, at a point 55 feet from the crossing, he discovered the train approaching, and he had a gentle team. It is not shown, nor is it to be assumed, that the plaintiff would have stopped short of this point if he had known of the approaching train earlier. On the contrary, it is common experience that a driver of a safe team approaches much closer to an approaching train in safety. Where, then, is the causal connection between the speed of the train and the injury? It

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cannot be said that the unusual speed of the train caused the fright of the horses, or that, if running within the prescribed rate of speed, the fright would not have occurred. It was the fact of the train at this point which occasioned the fright, and not the rate of speed at which the train had been running to reach the point. The plaintiff discovered the train in ample time to protect himself, whatever may have been its speed. An unlooked-for accident, viz. the fright of the horses, resulted in injury. A liability does not attach to every act of negligence. A liability attaches only when the injury results from the negligence. *Railway Co. v. Wilson*, 60 Tex. 142. And recovery for an omission to give proper signals cannot be had in any case where the traveler approaching the crossing has, by any means, timely notice of the approach of the train. *State v. Baltimore & O. R. Co.*, 69 Md. 339, 14 Atl. 685, 688; *Railroad Co. v. Houston*, 95 U. S. 697; *Pakalinsky v. Railroad Co.*, 82 N. Y. 424; 3 Elliott, R. R. § 1158. The collision cannot justly be said to have resulted from the speed of the train. If plaintiff had attempted to cross after discovering the train, there would have been some plausibility in claiming that the extraordinary speed caused the injury, although the rule is pretty well settled that one cannot balance the probabilities in such a situation, and, taking the chance of collision, drive in front of an approaching train. *Haas v. Railroad Co.*, 47 Mich. 401, 11 N. W. 216. But in this case the plaintiff's contention is that he made no attempt to cross. When he was 55 feet from the track, his horses took fright at the train, and "kept jumping ahead faster and faster, until they reached the track." Would the horses have been less likely to take fright if the bell had been sounding? Would they have been less likely to take fright if the train was going at less than six miles an hour, instead of running at a rate slightly in excess of that? Very clearly not. The alleged negligence of the company in failing to ring the bell and in excessive speed, if shown, did not cause the injury, but the

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injury was caused by the fright of the horses at an approaching train of cars, which it was plaintiff's duty to consider as at least a possibility ; for the authorities are substantially agreed that one approaching a crossing may not neglect attention to the track, relying upon hearing signals of approaching trains, but must be alert. Whether the plaintiff had proper control of the team is at least a doubtful question on this record, but, assuming he was not in fault in this respect, the negligence imputed to defendant was not a cause of the collision. It follows that the request of defendant to instruct a verdict should have been given. Judgment reversed, and no new trial ordered. The other justices concurred.

RING

v.

CHICAGO ST. P. & K. C. RY. CO.

(*Supreme Court of Iowa, May 20, 1898.*)

Accident at Railroad Crossing—Contributory Negligence Per Se.*

—A pedestrian injured while deliberately attempting to cross a railroad track by a train which he might have seen in time had he exercised the slightest care is guilty of contributory negligence as a matter of law, and defendant's negligence need not be considered in an action to recover for such injury.

APPEAL by plaintiff from Polk county district court.
Affirmed.

Henry S. Wilcox, for appellant.

Cummins & Wright, for appellee.

PER CURIAM. About half past 1 o'clock in the morning of April 3, 1892, plaintiff was passing along Eighth street, in the city of Des Moines, which is crossed by the track of the defendant railway. As he

*See *Herbert v. Southern Pac. Co.*, *ante*, and *note*.

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approached the crossing, and when about 35 feet from the track, he looked for a train, and, not perceiving any, passed on, and was just stepping on the rails when he was struck by a train which he says was running about 30 miles an hour. We need not consider the matter of defendant's negligence, for the case must be disposed of on another ground. At the point where plaintiff looked for a train, he says he could have seen the head-light of the locomotive at a distance of 500 or 600 feet. It is undisputed that the head-light was burning. He admits that when he got within 20 feet of the crossing, his view of the track was unobstructed for 2,000 feet in the direction the train was approaching. There does not appear to have been anything to distract his attention. On his own statement, he deliberately walked upon the railway track immediately in front of a rapidly moving train, that he might have seen had he exercised the slightest care. This case is not so favorable in its facts for plaintiff as was *Sala v. Railway Co.*, 85 Iowa, 678, 52 N. W. 664, in which, under circumstances somewhat similar, we held plaintiff to be negligent as a matter of law. There was nothing for a jury to pass upon in this case. We think the action of the trial court was right, and it will be affirmed.

HERBERT

v.

SOUTHERN PAC. CO.

(Supreme Court of California, June 20, 1898.)

Accident at Crossing—Negligence—Question for Jury.—The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence.

Same—Contributory Negligence Per Se.*—A driver of a vehicle, knowing that a train is approaching a crossing from behind a hill,

*See note at end of case.

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and chargeable with notice that it will reach the crossing at about the same time he would arrive there if he proceeded, will be guilty of contributory negligence as a matter of law if he attempts to cross before the train passes, and cannot recover if injured by the train while making such attempt even though defendant be guilty of negligence in failing to give the proper signals.

APPEAL by defendant from Placer county superior court. *Reversed.*

J. M. Fulweiler, for appellant.

Tabor & Tabor, for respondent.

TEMPLE, J. Action for damages for personal injuries resulting from a collision with a west-bound train of defendant at a private crossing about one-half mile west of Penryn. Plaintiff recovered a verdict for \$5,000. The appeal is from the judgment and from a refusal of a new trial.

It is contended on this appeal that upon plaintiff's own testimony, and conceding to him all disputed points in the evidence, and also that defendant was guilty of such negligence that it would be liable if plaintiff were not also in fault, it must be held as matter of law that plaintiff was guilty of such contributory negligence that he cannot recover. The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence. This proposition has been frequently declared by this court.

Accident at Crossing—Negligence—Question for Jury.

Fernandes v. Case, 52 Cal. 45; *McKeever's Case*, 59 Cal. 294; *Chedster's Case*, 59 Cal. 197; *House v. Meyer*, 100 Cal. 592, 35 Pac. 308. The rule is general, and appellant presents a very long list of cases in which the rule has been stated. The effect of all is the same. If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury. *McKune v. Lumber Co.*, 110 Cal. 480, 42 Pac. 980.

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Our ideas as to what would be proper care vary according to temperament, knowledge, and experience. A party should not be held to the peculiar notions of the judge as to what would be ordinary care. That only can be regarded as a standard or rule which would be recognized or enforced by all learned and conscientious judges, or could be formulated into a rule. In the nature of things, no such common standard can be reached in cases of negligence, where reasonable men can reach opposite conclusions upon the facts. In such cases it was said in *Mann v. Stock-Yard Co.*, 128 Ind. 138, 26 N. E. 819: "It is said to be the highest effort of the law to obtain the judgment of 12 men of the average of the community, comprising men of learning, men of little education, men whose learning consists only of what they have themselves seen and heard, the merchant, mechanic, the farmer, and laborer, as to whether negligence does or does not exist in the given case." But the cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case had been precisely defined; and, if any element is wanting, the courts will hold, as matter of law, that the plaintiff has been guilty of negligence. And, when injury results which might have been avoided by the use of proper care, the plaintiff cannot recover, although the defendant has also been guilty of negligence. In this special case the amount of care as well as the nature of it has been settled. The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and to listen for approaching trains. What he must do in such a case will depend upon circumstances. If the view of the track is obstructed, he should take greater pains to listen. If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions.

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In this case the plaintiff knew that the train was near. He had resided for four years within 200 feet of the crossing where he was injured. Immediately before reaching the crossing, the track passes through a cut, some 15 feet deep, for a distance of between 600 and 700 feet. Plaintiff saw the freight train at Penryn before he started home, and knew it was waiting there for the eastern-bound passenger train. From Penryn it is 1,630 feet to the whistling post, and 1320 feet from the post to the crossing. It is a steep down grade of about 115 feet to the mile, and the train passes down by gravity, controlled by the brakes. The road passes near the railroad until about 450 feet from the crossing, from which, as plaintiff testified, it meanders around a hill. When plaintiff was about half way to the whistling post, he met an eastern-bound train; and, when from 15 to 20 rods below the whistling post, he heard the "toot" which indicated that the freight train had started. At that time he was certainly more than 1,000 feet from the crossing, measured along the railroad track. He proceeded along until within about 450 feet of the crossing, looking all the time for the train. At that point he could see about 300 feet above the whistling post, and the train was not in sight. From that place he turned to go down and around the hill, and lost sight of the track. He proceeded at the rate of from six to seven miles an hour, until within about three rods, whence he proceeded on a walk to the crossing. He could see from the eminence from whence he had the last sight of the track that at that time the train was not within 1,620 feet of the crossing, and would have to make that distance while he was going 450 feet; that is, he would have known these facts had he known the precise distances, and these he did not know. He could only estimate. Nor did he know how rapidly the train would move. The engine driver thought he did move at about the rate of 12 miles an hour, but plaintiff could not know that it was not moving at a

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utory Negligence
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rate exceeding 20 miles an hour. Had the distances been known and also the speed of the train, it would have been a nice calculation to determine which could reach the crossing first. As a matter of fact, they reached there at about the same time, though plaintiff might have escaped "by the skin of his teeth" had not his horse, startled by the sudden appearance of the engine, stopped at the track.

Now, if the plaintiff had the train in mind, as he says he did, he knew that it was at hand, and could not be more than a few seconds away, and might be, as the event proved. It was a most reckless race with death, and, if it does not present a case free from doubt, such a case cannot be imagined.

Plaintiff must have been more than 1,000 feet from the crossing when he heard the signal that the train had started. He was familiar with the running of the train. When the signal referred to was given, the train was already out of the siding, on the main track, and the switch had been adjusted. The distance from the siding to the crossing, by actual measurement, was 2,980 feet. He knew the train came down more silently because of the steep grade, where no use of steam was required. It passed through the deep cut, where the sound would be deadened. One of the plaintiff's witnesses described how startlingly it appeared at the crossing, as though it came out of the ground. He had, at the best, but to wait a few seconds to let the train pass. Under such circumstances, to attempt to anticipate the train was almost an act of madness. The only answer to this is that defendant's employees did not ring the bell or sound the whistle, and that the fireman was not at his place, on the left side of the engine. The argument, of course, is that, if the signals had been given, plaintiff might have heard, and, not hearing them, he had the right to assume, when about to make the crossing, that the train had not then reached the whistling post 1,320 feet above, and that the fireman might have seen him in time to have pre-

Note

vented the accident had he been upon the lookout. It may be admitted that all this was culpable negligence on the part of defendant's employees. The defense of contributory negligence implies that defendant may have been guilty of such negligence as would justify a recovery by the plaintiff if he were not also in fault. This is no argument, therefore, against the position of the defendant.

The case is not within the rule laid down in *Esrey v. Southern Pac. Co.*, 103 Cal. 541, 37 Pac. 500. Doubtless, notwithstanding the negligence of a plaintiff has put him in peril, yet if his danger is perceived by the defendant in time, so that by the exercise of ordinary diligence on his part injury can be avoided, the defendant will be held for the injury. But that is based upon the fact that a defendant did actually know of the danger; not upon the proposition that he would have discovered the peril of the plaintiff, but for remissness on his part. Under this rule, a defendant is not liable because he ought to have known. The judgment and order are reversed, and a new trial ordered.

We concur: MCFARLAND, J.; HENSHAW, J.

NOTE.

Crossing in Front of Approaching Train—Contributory Negligence.—See *Burnett v. Eastern & A. R. Co.*, 10 Am. & Eng. R. Cas., N. S., 469, and *note*, p. 471; *Southern Ry. Co. v. Blake*, 10 Am. & Eng. R. Cas., N. S., 472; *Chicago & W. I. R. Co. v. Ptacek*, 10 Am. & Eng. R. Cas., N. S., 481, and *note*, p. 484; *State v. Cumberland & P. R. Co.*, 10 Am. & Eng. R. Cas., N. S., 511, and *note*, p. 518.

McIlhaney v. Southern R. Co

MCLHANEY

v.

SOUTHERN R. CO.*

(Supreme Court of North Carolina, May 17, 1898.)

Injury to Pedestrian on Track in Street—Contributory Negligence—Instructions.—A person walking for his own convenience on a railroad track in a street, which was filled by tracks and with the risks of which he was familiar, saw an engine approaching, and stepped off that track and went upon another, not stopping in the intervening space which was used by the public, as he desired to avoid the steam escaping from the engine, and was struck and injured by a box car, which he believed to be stationary, backing along the second track. *Held*, that an instruction upon the question of contributory negligence, which ignored the fact that more than ordinary care for the safety of the public at such dangerous point was due from the railroad company, was properly refused.

Petition by defendant for rehearing.

Burwell, Walker & Cansler, for petitioner.

G. F. Bason, J. W. Keerans, and A. B. Andrews, Jr., for defendant.

MONTGOMERY, J. After hearing additional argument in this case, and after a more thorough investigation of the precedents, we feel satisfied that a new trial ought not to have been ordered when the case was first before the court,—reported in 120 N. C. 551, 26 S. E. 815. The facts are set forth in detail in the reported case. The second issue was as to whether or not the plaintiff contributed to his own injury. His honor refused to give an instruction on that issue which was in these words: "If the jury believe that plaintiff would have been safe if, after stepping from the Seaboard track, he had stopped in the space between that track and the defendant's track, it was negligence for him to go further and place himself on defendant's

*See reported case 6 Am. & Eng. R. Cas., N. S., 693.

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track, and the answer to the second issue should be, 'Yes.' " For the refusal of his honor to give that instruction, this court granted a new trial. His honor's ruling ought to have been sustained. If the plaintiff had been walking at night on the railroad track, on which persons were accustomed to walk, at a place not used for such purposes as the railroad company was using the place for where the plaintiff was injured, and the plaintiff had been hurt in a collision with a car which was being shoved backwards without a light on the car, or without sufficient lights on the streets, or without ringing the bell of the engine propelling the car, he would have been entitled to recover for the injury, unless he saw the car, or could have seen it, and failed to get off the track. The company's negligence in such a case would be continuing, and the proximate cause of the injury. But at the place where the plaintiff was injured,—a section of A street, between Fifth and Trade, used by two railroad companies, with four tracks, for receiving their trains, shifting their cars, and as a freight depot,—the danger to all persons who might go to that point would be increased, as a matter of course; and the effect of the former decision in this case was to hold the plaintiff to a greater degree of care because of his presence there at that time. We failed, however, to require on the part of the company a greater and proportionate degree of care in managing its trains there than at other points. In the reported case the court said, "The use to which the street was put was a standing warning to pedestrians to be most careful when they undertook to walk through it." While that was correct, yet the company ought to have been held responsible for a corresponding degree of increased care for the safety of those persons who might be, and who had a right to be, in that place of more than ordinary risk. The trial was properly conducted, in all respects, below, and the order granting a new trial is revoked. The judgment of the court below is affirmed.

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DOUGLAS, J. (concurring). As I concurred in the judgment of this court, reported in 120 N. C. 551, 26 S. E. 815, I think it proper to say that, after a more careful consideration of the principles involved, I fully concur in the present opinion of the court, holding that there was no error in the trial below. As my opinion then was erroneous, I am glad to correct the error at the earliest possible moment, to prevent its becoming incorporated in the jurisprudence of our state. It is true that this court will, on rehearing, reverse its deliberate judgment only for the gravest reasons, because it stands as a decided case; but when the petition appeals to the conscience of the court, while a rehearing is a matter of legal discretion, it is of moral right. As said by JUDGE PEARSON, *flos judicium*, in his dissenting opinion in *Gaskill v. King*, 34 N. C. 223: "Let a case be taken as settling the law, *prima facie*; but, if it is shown not to be supported by the principle and the 'reason of the thing,' let it be overruled,—the sooner the better; for, if the error is allowed to spread, it may insinuate itself into so many parts, and become so much ramified, as to make it impossible to eradicate it without doing more harm than good. But, if the seed has not spread too much, pull it up and throw it away." The two railway companies had taken possession of part of a public street, on which they had laid four tracks, not for the convenience of the public, but purely for their own benefit. The plaintiff was not a trespasser, nor even a licensee. He was there by right,—fully as much so as the defendant. If the defendant had increased the danger of traveling a public highway by its own act, it had by that act imposed upon itself a greater degree of care. It cannot be heard to say that it has made the highway so dangerous as to impose upon the plaintiff so high a degree of care as practically to defeat his recovery, no matter how great its own negligence. The plaintiff was between the tracks, on the usual walk, and stepped upon the adjoining track to avoid the escaping steam of an engine, which, of course,

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drowned any ordinary sound. He testified that he saw the car that struck him, but did not think it was moving, as no bell was being rung, and no light was on the car. The jury apparently believed him. Under these circumstances, we must affirm the judgment below, or overrule our own decisions in the cases of *Hinkle v. Railroad Co.*, 13 S. E. 884; *Lloyd v. Railroad Co.*, 24 S. E. 805; *Stanley v. Railroad Co.*, 27 S. E. 27; and *Purnell v. Railroad Co.*, 29 S. E. 953. The charge of the court was full, and presented the case to the jury fairly and intelligibly. The facts were found by them under proper instructions, and I now see no reason to disturb their verdict.

FAIRCLOTH, C. J., and CLARK, J. (dissenting). We think the former opinion in this case (120 N. C. 551, 26 S. E. 815) was correct.

BERRY, *et al.*

v.

WEST VIRGINIA & P. R. Co.

(*Supreme Court of Appeals of West Virginia, April 2, 1898.*)

Carriers as Warehousemen.*—A railroad company is still under liability for a reasonable time as a common carrier while the goods are in the warehouse, but after such time it is only under liability as a warehouseman.

Same—Due Diligence in Removing Goods.—What is a reasonable time for removal of goods by the consignee from a railroad warehouse is a question of fact, under all the circumstances, for the jury; but, where the facts are clear and undisputed, it is a question of law for the court.

Same.—A consignee must promptly and diligently remove the goods in a reasonable time after arrival, without regard to distance from the depot, or the means of removal or convenience of the consignee, else the carrier will cease to be further liable as carrier.

Same—Notice to Consignees.*—A railroad company is not required to give notice to consignee of the arrival of the goods, but he must look out for their arrival, and remove them from the warehouse

e notes at end of case.

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within a reasonable time after arrival, and, if he does not after such time, the company is liable only as warehouseman, not as carrier. The consignee is not entitled to a reasonable time to get knowledge of arrival and another reasonable time for removal.

Same—Notice to Agent.—A drayman authorized to haul a merchant's goods from the depot is not, from that consideration merely, an agent whose knowledge of arrival of goods will be notice to the merchant.

Bills of Lading—Contracts Limiting Liability.*—A contract or clause in a bill of lading limiting the liability of a common carrier or exempting it is valid, provided it is based on valuable consideration, and does not so limit or exempt from liability for negligence of the carrier.

Destruction of Goods in Warehouse—Liability of Railroad Company.—Where goods stored in a railroad warehouse are called for by the consignee, and he is informed by an agent that they have not arrived, which prevents their removal, and they are destroyed by the burning of the warehouse, the company is liable.

(Syllabus by the Court).

ERROR by defendant to Braxton county circuit court. *Affirmed.*

John Brannon, for plaintiff in error.

W. E. R. Byrne and *H. B. Black*, for defendant in error.

BRANNON, P. In an action before a justice in Braxton county, *Berry & Son* recovered a judgment against the *West Virginia & Pittsburg Railroad Company*, and on appeal the case was tried by a jury, and the plaintiffs recovered a judgment against the company, which has been brought here by writ of error. The action was to recover damages for the destruction of a roll of carpet in the burning of the company's warehouse at Sutton. As the fire is not to be attributed to the negligence of the company, the question at once arises whether the company is to be judged by the law of common carriers or not, for the law makes a common carrier an insurer of the goods against everything except the act of God, the public enemy, or the conduct of the owner, or from the nature and character of the property (*McGraw v. Railroad Co.*, 18 W. Va. 361); whereas a warehouseman, who is a mere bailee, can be made liable only by proof of his negligence. The question, then, is one which, so

*See notes at end of case.

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far as I know, has never been decided in either of the Virginias, but which has been the subject of elaborate, able, and refined discussions in the great courts of the country, and upon it those courts have widely differed. So close is the question, so well defended has been each side, that it is very difficult to decide which is the more logical view. The question is this: When a railroad company has transported goods from the point of shipment to the point of delivery, and has unloaded them from its cars, and deposited them in its warehouse, is it still, while the goods are in the warehouse, bound by the law applicable to common carriers as it was during the transit, or did its liability under that law cease the moment the goods reached destination, and were removed from the car? I hold that, after the removal from the car, for a reasonable time, the company yet remains bound by the law of common carrier, and after the expiration of such reasonable time it ceases to be bound by that law of bailment. I hold that the court should construe the contract to be one by which the carrier, under the law of carriers, undertakes to carry goods from the point of shipment to the point of destination, and deliver them to the consignee within a reasonable time after arrival, and to preserve them after arrival during that reasonable time in a warehouse after unloading them from the cars, and so preserve them still under the same law of common carrier. So the parties really meant and understood the contract. They did not mean—certainly the shipper did not mean—that between shipment and delivery the relation of the parties should be changed by converting the carrier into a warehouseman. The common sense of the contract makes it one contract under one rule of law, and does not split it into two contracts governed by different principles of law. And with me public policy operates very strongly in solving the vexed question. That policy, for high public purposes of safety to the owners of property passing over the railroads and other means of transportation, exacts the most rigid liability of common carriers, makes them

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insurers, and courts should be very slow, when they know the necessity of the enforcement of this public policy, to render decisions abating from the liability imposed upon common carriers by the law. In our days, more than ever before, railroads and other common carriers have become almost a part of the government, as they perform such vastly important public functions in the business of organized society; and, while the courts should do them justice, they should not release them from legal liability upon mere abstract refinements. It is a refinement to say that this company was under the liability of common carrier from Philadelphia to Sutton, but that when it moved this bale of carpet from its cars upon its platform that liability instantly ceased, and it became subject to a lessened degree of legal responsibility. It seems technical and unjust to the shipper unless that shipper delays to call for his goods beyond a reasonable time, and thus becomes, in the eye of the law, himself involved. The argument has been made that the shipper should be at the station to receive his goods instantly on arrival and that the warehouse is made for his benefit to preserve his goods, and not for the benefit of the railroad company, and therefore the shipper should excuse the carrier from the rigid liability of carriers so soon as the goods leave the car doors. But this argument is surely not tenable. The company cannot keep goods in cars, because the cars are needed elsewhere for its business. It cannot conveniently separate and deliver numerous articles piled in the cars as they are called for. It cannot obstruct its tracks with standing cars. Goods must sometimes be kept for weeks before delivery, and other goods must be detained for payment of freight. The warehouse is indispensable to the company for its own necessary purposes, and in no just sense is it maintained for the sole benefit of shippers, so as to enter as an element against them in the question whether as to goods stored in it the carrier is yet a carrier or a warehouseman. Nor can it be a duty of the shipper to be at the depot on arrival of

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his goods. There is no certainty as to time of arrival, and this, not from the shipper's fault, but from the fault, if any fault there be, of the company. No schedule of freight trains will afford the shipper any certain guide, as they are so irregular. In long transits, and over connecting lines, the shipper cannot even guess as to time of arrival. To require him to be at the depot, or suffer for failure to be there, would charge to him the fault of the company in delays. I say that we can draw no logical difference between the warehouse and the car as to the character of the liability of the company. They are both necessary instruments in the performance of the function of transportation and delivery, both of which are duties assumed by the company. I think that the discussion of this subject in the latest and very valuable work on Railroads by Elliott (volume 4, § 1527) is a clear, strong presentation of the subject. He takes the view in result above expressed. Such is the great weight of authority. It is clearly and succinctly stated, also, in 5 Am. & Eng. Enc. Law, 264. See Hutch. Carr. § 367. Thus I conclude that the defendant cannot be relieved from liability on the theory that its liability as common carrier had ceased.

I have stated above that the carrier continues liable as such for a reasonable time after the arrival of the goods. The question what is a reasonable time cannot be definitely fixed by hours. Due Diligence—
Removing Goods. Hutchinson on Carriers, § 377, says that the reasonable time in which to remove the goods will be such as would enable the consignee, if living in the vicinity of the place of delivery, to remove them in the ordinary course and in the usual hours of business, and that this time will not be varied to suit the distance at which the shipper may reside, nor his convenience or means of removal, but he must remove the goods with diligence after he is informed of their arrival, and must provide ample means to do so. This is the case even under the rule that the carrier's liability does not cease until a reasonable time after the arrival

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of the goods. The duty of the consignee to take the goods away is as imperative as the duty of the carrier to deliver them. He cannot, at his option, continue the stringent liability of the carrier, but must act promptly, and, if he does not, the liability of the carrier as an insurer ends. Of course, I am not to be understood as saying that, after such reasonable time, no liability whatever rests on the railroad company. I mean only that its liability as carrier ends, and that it then becomes liable only as bailee. *Tarbell v. Shipping Co.* (N. Y. App.) 17 N. E. 721. See 5 Am. & Eng. Enc. Law, 270. What is a reasonable time is largely a question of fact, dependent upon the circumstances, to be decided by the jury. If the facts are accurate or undisputed, it is a question of law; otherwise it is a jury question. *Id.*

Is it a duty of the railroad company to give notice of the arrival of goods? Some authorities say that

Same—Notice to
Consignee.

it is as to persons living in the vicinity of the depot; but the better authorities, and the reason of the matter, declare that it is not incumbent upon the railroad to give such notice. Why? While the consignee need not be at the depot to take his goods at the moment of arrival, and the law retains the railroad company under the liability as carrier for a reasonable time, yet it does not indefinitely hold it under this high degree of liability, but requires the consignee to keep a lookout for the arrival of his goods by adopting such means as may be expected to inform him of their arrival. No notice from the company is necessary. *Railroad Co. v. Carter*, 165 Ill. 570, 46 N. E. 374; 4 Elliott, R. R. § 1527; *Ror. R. R.* 1289; 2 Redf. R. R. § 175, point 4. *Railroad Co. v. Morehead*, 5 W. Va. 293, seems to hold that notice is necessary, but it seems against the better authorities, and based on exceptional circumstances on account of inability to deliver at the point of destination. I remark that the provisions of Code, p. 550, refer not to notice of arrival of goods, but that notice which is requisite to enable a railroad company, after the lapse

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of 24 hours from the arrival of the goods, to charge storage therefor. The consignee is not entitled to a reasonable time to obtain knowledge of arrival of the goods, and then another reasonable time to remove the goods. If we hold that the carrier is under obligation to give notice, then the consignee would have a reasonable time after notice to remove the goods; but if we hold, in the absence of usage, that it is not necessary that the railroad should give notice of arrival, it follows that the consignee has a reasonable time after arrival in which to remove the goods. The goods arrived about 5 o'clock p. m. on the 9th of April, and were burned on the 9th or 10th. The jury found that a reasonable time had not elapsed after arrival in which the goods should have been taken away in this instance, so far as its verdict is based upon that question, and I cannot say that the time was beyond a reasonable time. In my view, if that time was a reasonable time, it is not material when within that time the plaintiffs knew of the arrival of the goods, because the entire time is not longer than a reasonable time. We would infer from some books that the consignee has a reasonable time after notice, but I hold that the reasonable time commences from arrival. Where the party is present on the arrival, or gets early notice of arrival, that fact enters as an important element in the decision of what is a reasonable time for removal, as, having notice, he should proceed promptly to consummate the removal; but he has a reasonable time, notice or no notice, after arrival of the goods to effect their removal. There is controversy in this case as to notice to the plaintiff of the arrival of the goods, and that involves a question of some importance. A drayman, who was in the habit of hauling goods for the plaintiffs, who were merchants doing business at Sutton, knew distinctly of the arrival of this carpet on the evening of the 9th of April, but, as it was raining, declined to take it; and the question comes up whether notice to him is notice to the plaintiffs. I hold that it is not. It would be going very

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far to say that a drayman, who was authorized merely to haul goods from the depot to the store, is an agent vested with the authority to receive notice to affect his employer, and change that employer's relation to the carrier as to the extent of the carrier's responsibility. Never did the merchant intend to constitute him an agent for such serious purpose. "The authority, if it existed at all, must find its source in the intention of the principal, whether expressed or implied. If that intention cannot be shown, the authority cannot exist." *Mechem*, Ag. 177. Such an agency is not to be so lightly created. Under the finding of the jury there can be no other notice considered than that received by the plaintiffs about 5 o'clock of April 10th, —only an hour before the closing of the warehouse,—and that did not convict the plaintiffs of any want of reasonable diligence in removing the goods.

The defendant claims exemption by reason of a clause found in the bill of lading providing that the company should not be liable for any loss or damage to the carpet by fire and other specified causes beyond its control. It is claimed that this can have no effect contrary to the law. Such special provisions cannot excuse a common carrier from negligence. No stipulation can excuse it from liability for negligence, because it would relax the diligence and obligations of common carriers to the injury of the public, and would be against public policy. 5 Am. & Eng. Enc. Law, 288. This court has not denied the validity of the contracts of common carriers limiting their liability, but it has held that they cannot exempt from negligence of the carrier. *Zouch v. Railway Co.*, 36 W. Va. 524, 15 S. E. 185; *Brown v. Express Co.*, 15 W. Va. 812; *Maslin v. Railroad Co.*, 14 W. Va. 180. But those cases explicitly state that there must be a valuable consideration for such special contracts, and such I understand to be the general law. 5 Am. & Eng. Enc. Law, 298. It does not appear that there was any consideration for the exemption here claimed, by way

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ing Liability.

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of reduced freight or otherwise, so as to make said contract work any result in this case. But there is one fact in this case which must decide it against the railroad company, regardless of when its liability as carrier ceased, and regardless of notice or diligence on the part of the plaintiffs, for a drayman called for this carpet on the evening before its destruction by fire, and was told by an assistant agent at the warehouse that the carpet had not arrived. But for this fact, it would have been removed and saved. The law seems to be very well settled that misinformation given by the railroad company or its agents to the consignee as to the arrival of the goods will bind the company, even though we regard it as only resting under the liability of warehousemen, when such information prevents the removal of the goods. 4 Elliott, R. R. § 1463; 5 Am. & Eng. Enc. Law, 275; 2 Redf. R. R. § 175, point 10; Railroad Co. v. Cotton, 95 Am. Dec. 656.

There is no sign of a plea in this case, and we might raise the question whether the defendant is entitled to have the points made by him considered, as we might say that it is a mere inquiry of damages by a jury in the absence of a plea. These facts lead us to the affirmance of the judgment.

NOTES.

Carriers of Goods—When Liability as Warehousemen Begins.—There is a conflict in the authorities as to when the carrier's liability as such ceases and its liability as warehouseman only attaches. One class of cases, adopts what is known as the Massachusetts doctrine.

Massachusetts Doctrine.—In *Thomas v. Boston, etc., R. Corp.*, 10 Met. (Mass.) 477, 43 Am. Dec. 444, the court pointed out that owing to the peculiar character of railroads and the large business done by them, personal delivery to each consignee was impracticable; that they could only be required to carry the goods safely to the station and place them on the platform or in a warehouse. After this, "they have done all they agreed to do; they have received the goods, have transported them safely to the place of delivery, and, the consignee not being present to receive them, have unladed them and have put them in a safe and proper place for the consignee to take them away. * * * The liability of common carriers being ended, the proprietors are, by force of law, depositaries of the goods, and

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are bound to reasonable diligence in the custody of them, and consequently are only liable to the owners in case of a want of ordinary care." The same views are forcibly expressed by SHAW, C. J., in the later case of *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 272, 61 Am. Dec. 423. See also *Rice v. Boston, etc., R. Corp.* 98 Mass. 212; *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *Lane v. Boston, etc., R. Co.*, 112 Mass. 455; *Stowe v. New York, etc., R. Co.*, 113 Mass. 521; *Rice v. Hart*, 118 Mass. 201, 19 Am. Rep. 433.

In *Sessions v. Western R. Corp.*, 16 Gray (Mass.) 132, after a portion of the goods had been removed, the remainder were destroyed by fire while in the company's warehouse. It was held, following the rule above stated, that the company could be held only as a warehouseman. See also *Bassett v. Connecticut River R. Co.*, 145 Mass. 129, 1 Am. St. Rep. 443; *Blaisdell v. Connecticut River R. Co.*, 145 Mass. 132.

Georgia.—The Massachusetts doctrine prevails in the absence of a different custom as to delivery. No notice to the consignee is necessary, except where the goods arrive out of time, in which case notice must be given and the consignee allowed a reasonable time to call for and remove them. See *Georgia Code* § 2070; *Southwestern R. Co. v. Felder*, 46 Ga. 433, 11 Am. Ry. Rep. 419; *Western, etc., R. Co. v. Camp*, 53 Ga. 596; *Almand v. Georgia R. etc., Co.*, 95 Ga. 775. See also *Rome R. Co. v. Sullivan*, 14 Ga. 277; *Central R., etc., Co. v. Anderson*, 58 Ga. 393, 16 Am. Ry. Rep. 85; *Georgia R., etc., Co. v. Thompson*, 86 Ga. 327, 45 Am. & Eng. R. Cas. 422, *note*.

Illinois.—When goods have arrived at their destination, it is the duty of the carrier to unload them and put them in a place usually convenient for being taken away by the consignee. If the consignee is not there, they must be stored in a safe warehouse, there to remain until called for or until the lapse of a reasonable time. With such unloading the carrier's liability as insurer ceases, and his responsibility thereafter is that of a warehouseman only. Whether the goods are unloaded directly into a warehouse or upon the platform does not alter the rights of the parties. *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 37 Am. St. Rep. 238, *affirming* 47 Ill. App. 590; *Porter v. Chicago, etc., R. Co.*, 20 Ill. 407, 71 Am. Dec. 286; *Illinois Cent. R. Co. v. Alexander*, 20 Ill. 23; *Davis v. Michigan Southern, etc., R. Co.*, 20 Ill. 412; *Illinois Cent. R. Co. v. Friend*, 64 Ill. 303; *Richards v. Michigan Southern, etc., R. Co.* 20 Ill. 404; *Chicago, etc., R. Co. v. Scott*, 42 Ill. 132; *Vincent v. Chicago, etc., R. Co.*, 49 Ill. 33; *Merchants' Dispatch Transp. Co. v. Hallock*, 64 Ill. 284; *Rothschild v. Michigan Cent. R. Co.*, 69 Ill. 164; *Chicago, etc., R. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613; *Cahn v. Michigan Cent. R. Co.*, 71 Ill. 96; *Merchants' Dispatch, etc., Co. v. Moore*, 88 Ill. 138, 30 Am. Rep. 541; *Chicago, etc., R. Co. v. Jenkins*, 103 Ill. 599.

But the liability as a common carrier ceases only after the unloading of the goods. *Chicago, etc., R. Co. v. Bensley*, 69 Ill. 630.

Indiana.—*Cincinnati, etc., Air Line R. Co. v. McCool*, 26 Ind. 140; *Bansemmer v. Toledo, etc., R. Co.*, 25 Ind. 434, 87 Am. Dec. 367. See also *Pittsburg, etc., R. Co. v. Nash*, 43 Ind. 423.

Iowa.—*Mohr v. Chicago, etc., R. Co.*, 40 Iowa 579; *Francis v. Dubaque, etc., R. Co.*, 25 Iowa 60, 95 Am. Dec. 769.

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Rule May Vary with Character of Consignment.—In *Independence Mills Co. v. Burlington, etc.*, R. Co., 72 Iowa 535, 2 Am. St. Rep. 258, 32 Am. & Eng. R. Cas. 456, the court by ROTHROCK, J., referring to the two cases just cited, said: "The principle upon which these cases were determined is that when a common carrier has transported the property to its destination and done all of the acts pertaining to the carriage of the goods, his liability as such carrier ceases. There can, however, be no uniform rule as to what acts are necessary to be done to fulfil the carrier's contract. His duties must vary according to the nature of the consignment. In the cited cases the property was such that it could be removed from the cars and placed in an ordinary depot warehouse. But in the case at bar the grain was in bulk. It was not expected by the parties that it would be removed from the car by the railroad company and carried into its warehouse. It was its duty to place it in such a position on its track that it could be safely, and with a reasonable degree of convenience, unloaded by the plaintiff; and it was the right of the plaintiff to refuse to unload the car until it was so placed; and as long as the defendant, in obedience to its obligation as a common carrier, was required to move the car upon the track, its liability as such common carrier did not cease." See also *State v. Creeden*, 78 Iowa, 556, 40 Am. & Eng. R. Cas. 31.

Missouri.—*Gashweiler v. Wabash, etc.*, R. Co., 83 Mo. 112, 25 Am. & Eng. R. Cas. 403, 53 Am. Rep. 558; *E. O. Stanard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258, 61 Am. & Eng. R. Cas. 185; *Rankin v. Pacific R. Co.*, 55 Mo. 167; *Holtzclaw v. Duff*, 27 Mo. 395; *Cramer v. American Merchants' Union Express Co.*, 56 Mo. 524; *Eaton v. St. Louis, etc.*, R. Co., 12 Mo. App. 386; *Bergner v. Chicago, etc.*, R. Co., 13 Mo. App. 499; *Kansas City Transfer Co. v. Neiswanger*, 18 Mo. App. 103; *Buddy v. Wabash, etc.*, R. Co., 20 Mo. App. 206; *Hartmann v. Louisville, etc.*, R. Co., 39 Mo. App. 88; *Pindell v. St. Louis, etc.*, R. Co., 41 Mo. App. 84. Compare *Bell v. St. Louis, etc.*, R. Co., 6 Mo. App. 363.

New Jersey.—It is not clear what the doctrine of the New Jersey courts is. In *Morris etc.*, R. Co. *v. Ayres*, 29 N. J. L. 393, 80 Am. Dec. 215, the goods, which consisted of about three wagon loads of merchandise, reached their destination and were safely warehoused, ready for delivery to the consignee upon his paying the freight and signing a receipt for all of them. The plaintiff, the consignee, wanted to remove the goods by one wagon load at a time, and offered to receipt for them as he received them, but this was declined because a regulation of the company required a receipt for all goods before delivery of any part of them. In an action of replevin to recover the goods, it was held that he could not maintain his action. The court, by HAINES, J., said: "Having the merchandise in good order and safely stored and protected from the weather and from trespassers, and ready for delivery, allowing a reasonable time for the owner or consignee to remove them, their duty as carrier ceases and they are no longer liable as carriers. After that they become warehousemen, with the liability only of bailees without hire and responsible only for ordinary neglect. Citing *inter alia* the Massachusetts cases above reviewed, and *Powell v. Myers*, 26 Wend. (N. Y.) 591. From this it would seem that the Massachusetts doctrine prevails; though some of the text-writers, impressed by the phrase "allowing a reasonable time," etc., regard this decision as following the

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New Hampshire rule. See 3 Wood on Railways (ed. 1894) 1935; Hutchinson on Carriers, § 370.

North Carolina.—Neal v. Wilmington, etc., R. Co., 8 Jones L. (N. Car.) 482; Turrentine v. Wilmington, etc., R. Co., 100 N. Car. 375, 6 Am. St. Rep. 602. See also Hilliard v. Wilmington, etc., R. Co., 6 Jones L. (N. Car.) 343.

Pennsylvania.—McCarty v. New York, etc., R. Co., 30 Pa. St. 247; Shenk v. Philadelphia Steam Propeller Co., 60 Pa. St. 109, 100 Am. Dec. 541. See also National Line Steamship Co. v. Smart, 107 Pa. St. 492. But a different rule obtains as to express companies; they are bound to make actual delivery. Union Express Co. v. Ohleman, 92 Pa. St. 323. And the carrier is bound to give notice when he specially contracts to do so. Tanner v. Oil Creek R. Co., 53 Pa. St. 411.

In Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434, the goods arrived at their destination about dark on Saturday evening, and at the request of the consignee the car containing them was run on to a side track to remain until Monday morning, at which time the consignee opened the car and found that some of his goods had been stolen. The carrier was held liable.

Tennessee.—In Tennessee the Massachusetts rule prevails. East Tennessee, etc., R. Co. v. Kelly, 91 Tenn. 699, 55 Am. & Eng. R. Cas. 621, where the court, by CALDWELL, J., said: "Discussion of the respective considerations upon which the two rules [the Massachusetts and the New Hampshire doctrines] are rested by their opposing adherents will not be indulged in this opinion, since this court has heretofore adopted the Massachusetts rule, and no sufficient reason for changing the precedent already established is perceived. The cases of Butler v. East Tennessee, etc., R. Co., 8 Lea (Tenn.) 32, 9 Am. & Eng. R. Cas. 249, and Southern Express Co. v. Kaufman, 12 Heisk. (Tenn.) 165, have been followed in several unreported cases, the last of which was E. T. V. & G. R. Co. v. Gettys, decided at the present term."

See also Dean v. Vaccaro, 2 Head (Tenn.) 488, 75 Am. Dec. 744; Lancaster Mills v. Merchants' Cotton-Press Co., 89 Tenn. 1, 24 Am. St. Rep. 586, 45 Am. & Eng. R. Cas. 423.

The statutory provision requiring notice to the consignee (M. & V. Code Tenn. § 2788) does not extend the liability of the carrier. Butler v. East Tennessee, etc., R. Co., 8 Lea (Tenn.) 32.

The New Hampshire Doctrine.—Another class of cases follows what is known as the New Hampshire doctrine. In Moses v. Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 388, the question was discussed at length. In announcing the rule of the text, the court, by SAWYER, J., said: "For all purposes which have reference to the difficulties and embarrassments in the way of the owner in attempting to prove loss or damage by the fault or neglect of the company, to his inability to give them any oversight or protection, and to his security against fraud and collusion until he can have reasonable opportunity to see by his own observation, or that of others than the servants of the company, that they have arrived, and to send for and take them away, he stands in the same relation to them as when they were actually in course of transportation. The same broad principles of public policy and convenience upon which the common-law liability of the carrier is made to rest have equal application after the goods are removed into the warehouse as before,

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until the owner or consignee can have that opportunity; and the same necessity exists for encouraging the fidelity and stimulating the care and diligence of those who thus continue to retain them in charge, by holding that they shall continue subject to the risk." See also *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84; *Smith v. Nashua, etc., R. Co.*, 27 N. H. 86, 59 Am. Dec. 364.

Common Carrier by Water.—In the case of a common carrier of goods by water, the consignee is entitled to notice of discharge and to a reasonable time to inspect and remove the goods, or to reject them. Until the lapse of that time, the delivery is not complete, and the ship as carrier remains liable as an insurer of the goods which she is bound to deliver safely to the consignee. After notice of discharge given to the consignee and a reasonable opportunity to him to inspect and to remove or reject the goods, the ship's liability as carrier ceases, but if the consignee refuse or neglect to receive them the ship's duties are not then ended. Until acceptance by the consignee, the ship having the goods in her custody is still liable as bailee, and bound to reasonable care for their safe custody, or to store them on account of the owner. But she is bound to reasonable care only. *The City of Lincoln*, 25 Fed. Rep. 835; *The Mary Washington*, 1 Abb. (U. S.) 1 Chase's Dec. (U. S.) 125.

Alabama.—*Louisville, etc., R. Co. v. McGuire*, 79 Ala. 395. In *Collins v. Alabama G. S. R. Co.*, 104 Alabama 390, the court, by HARALSON, J., said: "According to the decisions of this court, without reference to any statute on the subject, the liability of a railroad company as a common carrier of goods transported over its line does not cease on the arrival of the goods at their destination and their deposit there in a warehouse, but continues until the lapse of a reasonable time for the removal of the goods by the consignee, and its liability as a warehouseman does not begin until its liability as a common carrier has ceased. *Columbus, etc., R. Co. v. Ludden*, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404; *Anniston, etc., R. Co. v. Ledbetter*, 92 Ala. 326. As a general rule, the undertaking of a common carrier to transport goods to a particular destination includes the obligation of a safe delivery of them to the consignee. *South, etc., Alabama R. Co. v. Wood*, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419, 41 Am. Rep. 749. The decisions of this court, however, in the case of railroads, have established the rule to be that when a railroad company receives goods for transportation, safely carries them to their destination, informs the consignee of their arrival, and affords him reasonable opportunity to remove them, its duty and obligation as a common carrier are at an end." *Citing Kennedy v. Mobile, etc., R. Co.*, 74 Ala. 430, 21 Am. & Eng. R. Cas. 145; *Mobile, etc., R. Co. v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586, *Alabama, etc., R. Co. v. Kidd*, 35 Ala. 209. See also *Western R. Co. v. Little*, 80 Ala. 159, 37 Am. & Eng. R. Cas. 659; *Alabama G. S. R. Co. v. Grabfelder*, 83 Ala. 200. *Compare* *Southern Express Co. v. Armistead*, 50 Ala. 350.

Under the statute, Ala. Code, § 1180, where the destination of the goods is a city of two thousand or more inhabitants, and having a daily mail, the liability of the company becomes that of a warehouseman only when, within twenty-four hours after the arrival of the goods, it has stored them in a safe warehouse and mailed a notice to the consignee. The notice may be to a third party where the consignor so directs. *Collins v. Alabama G. S. R. Co.*, 104 Ala. 390.

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Three days after notice of arrival is a reasonable time, and the carrier is liable only as a warehouseman for a loss occurring at the end of such time. *Anniston, etc., R. Co. v. Ledbetter*, 92 Ala. 326.

Arkansas.—The carrier is liable as insurer until a reasonable time after notice to the consignee. *Missouri Pac. R. Co. v. Nevill*, 60 Ark. 375.

California.—In this state the Massachusetts doctrine seems to have obtained originally. See *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 270. But the New Hampshire doctrine now prevails in consequence of the provisions of § 2120 of the Civil Code requiring notice to the consignee of the arrival of the goods. See *Wilson v. California Cent. R. Co.*, 94 Cal. 166; *Cavallaro v. Texas, etc., R. Co.*, 110 Cal. 348. See also *Hirshfield v. Central Pac. R. Co.*, 56 Cal. 484, 7 Am. & Eng. R. Cas. 398.

Connecticut.—In the case of *Graves v. Hartford, etc., Steamboat Co.*, 38 Conn. 143, 9 Am. Rep. 369, it was held that the carrier is not discharged from liability as a carrier, by placing the goods either on the platform or in the warehouse for delivery. In the opinion in this case the court expressly disapproved the Massachusetts doctrine, and speaking by SEYMOUR, J. said: "Whatever reasons there are for imposing a strict rule of responsibility during the transit, exist and continue in full force until the consignee has had a reasonable time to take the goods into his own care and custody. * * * In making the delivery, care is needed to avoid mistakes, and attention required to see if the goods are uninjured. During the whole process of delivery, until fully completed, the goods should remain in the care of the carrier upon the full responsibility pertaining to him as such, and he ought not to be allowed to lay aside that responsibility until the owner of the goods has had a fair and reasonable time and opportunity to receive them."

Delaware.—See *McHenry v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 448.

Kansas.—The extraordinary liability of a railroad company as a common carrier extends not merely to the termination of the actual transit of the goods to their destination, but also until the consignee has had a reasonable time thereafter to inspect the goods and to remove them in the usual hours and in the ordinary course of business. *Leavenworth, etc., R. Co. v. Maris*, 16 Kan. 333; *Missouri Pac. R. Co. v. Wichita Wholesale Grocery Co.*, 55 Kan. 525.

Kentucky.—*Jeffersonville R. Co. v. Cleveland*, 2 Bush (Ky.) 473. See *Wald v. Louisville, etc., R. Co.*, 92 Ky. 645.

Louisiana.—*Maignan v. New Orleans, etc., R. Co.*, 24 La. Ann. 333.

Maryland.—In a case where the company had charged, besides the regular freight charges, a compensation for streetage to the plaintiff's place of business, and the question was raised as to whether there had been a delivery when the goods were not brought to the plaintiff's place of business, it was held that the court should have left it to the jury to find whether the course of dealing between the railroad company and the consignee was such as to make it unreasonable to expect personal notice of the arrival of the cars; and if such course of dealing rendered such notice unnecessary or dispensed with it, then the company was not imperatively required to give such notice to constitute delivery, notwithstanding the extra charge of streetage. *Baltimore, etc., R. Co. v. Greene*, 25 Md. 72.

Michigan.—*McMillen v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208. In this case the court was equally divided as

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to what the correct doctrine was, but COOLY, J., laid down the New Hampshire rule as being the true one. In a subsequent case, his views were approved by the court, *Buckley v. Great Western R. Co.*, 18 Mich. 121.

In the absence of an express contract or one fairly inferable from the nature of the business, the known necessities under which it is carried on, and the established usage between the parties, the company cannot shift its responsibility as a common carrier to that of a mere warehouseman by simply depositing the goods in the warehouse at the end of its route. *Feige v. Michigan Cent. R. Co.*, 62 Mich. 1; *Black v. Ashley*, 80 Mich. 90, 42 Am. & Eng. R. Cas. 428. But it is liable only as a warehouseman where the goods are retained at its office at the request of the consignees. *Hasse v. American Express Co.*, 94 Mich. 133, 34 Am. St. Rep. 328, 55 Am. & Eng. R. Cas. 635, *note*.

Minnesota.—*Pinney v. First Div. St. Paul, etc., R. Co.*, 19 Minn. 251, 20 Am. Ry. Rep. 71; *Derosia v. Winona, etc., R. Co.*, 18 Minn. 133; *Arthur v. St. Paul, etc., R. Co.*, 38 Minn. 95; *Kirk v. Chicago, etc., R. Co.*, 59 Minn. 161, 61 Am. & Eng. R. Cas. 203 (carrier held liable for goods stolen from car while it was at station). See also *Armstrong v. Chicago, etc., R. Co.*, 45 Minn. 85, 45 Am. & Eng. R. Cas. 422, *note*.

Nebraska.—*Burlington, etc., R. Co. v. Arms*, 15 Neb. 69.

New York.—*Mills v. Michigan Cent. R. Co.*, 45 N. Y. 622, 6 Am. Rep. 152; *Hedges v. Hudson River R. Co.*, 49 N. Y. 223; *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442, 10 Am. Rep. 402; *McAndrew v. Whitlock*, 52 N. Y. 40, 11 Am. Rep. 657; *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394; *McKinney v. Jewett*, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574, *reversing* 44 N. Y. Super. Ct. 471; *Draper v. Delaware, etc., Canal Co.*, 118 N. Y. 118, 42 Am. & Eng. R. Cas. 410; *Solomon v. Philadelphia, etc., Express Steamboat Co.*, 2 Daly (N. Y.) 104. See also *Pelton v. Rensselaer, etc., R. Co.*, 54 N. Y. 214, 13 Am. Rep. 568; *Sprague v. New York Cent. R. Co.*, 52 N. Y. 637; *Nicholas v. New York Cent., etc., R. Co.*, 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103.

In *Sherman v. Hudson River R. Co.*, 64 N. Y. 254, it was said that a carrier has not performed his duty until he has delivered or offered to deliver the goods to the consignee "or done what the law esteems equivalent to delivery. When the consignee is unknown to the carrier, a due effort to find him and notify him of the arrival of the goods is a condition precedent to the right to warehouse them."

In the case of *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574, *reversing* 44 N. Y. Super. Ct. 471, it appeared that the plaintiffs contracted with the N. Co. for the transportation of certain goods from New York to Boston and their delivery to the plaintiffs, who were the consignees. The goods were received by the defendants, who were residents of Massachusetts and connecting carriers over the latter part of the route. Upon the arrival of the goods at Boston, they were called for, but delivery was refused until the next day, it not being convenient at that time. They were unloaded the same afternoon and placed in the defendant's warehouse, but too late for delivery. During the night, the warehouse, with the goods, was destroyed by fire. In an action in New York, to recover for the loss, it was held that the defendants were liable without proof of negligence as to the fire, and this although under the decisions of the

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Massachusetts courts, a railroad company, as a matter of law, ceases to be a common carrier and becomes a warehouseman when the transportation is completed and the goods are deposited in a warehouse to await the orders of the owner or consignee. The court in this case stated the law as follows: "It is his, [the carrier's] duty not only to transport the goods, but he has not performed his entire contract as a common carrier until he has delivered the goods, or offered to deliver them, to the consignee, or has done what is equivalent, by giving to the consignee, if he can be found, due notice after the arrival, and by furnishing him a reasonable time thereafter to take charge of or to remove the same."

If the consignee does not then call for the goods, liability as a common carrier ceases. *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709.

If the loss or injury results from a want of ordinary care on the part of the carrier, the question of reasonable time becomes immaterial. *Lamb v. Camden, etc., R. etc., Co.*, 2 Daly (N. Y.) 454.

Ohio.—The carrier's liability as insurer continues until after the consignee has been notified of the arrival of his goods and has had a reasonable time in which to inspect and remove them. *Lake Erie, etc., R. Co. v. Hatch*, 6 Ohio Cir. Ct. Rep. 230, *affirmed* 52 Ohio St. 408, 61 Am. & Eng. R. Cas. 293, *note*; *Hirsch v. Steamboat Quaker City*, 2 Disney (Ohio) 144. See also *Tanner v. Oil Creek R. Co.*, 53 Pa. St. 411; *Chicago, etc., R. Co. v. Scott*, 42 Ill. 133.

South Carolina.—The doctrine in South Carolina is not definitely determined. See *Spears v. Spartanburg, etc., R. Co.*, 11 S. Car. 158, where it is said that the carrier's liability as insurer does not extend over the whole time of the existence of its lien for freight charges.

Texas.—In this state, the rule is declared by statute to be that the carrier's liability as such continues until actual delivery to the consignee or his agent, but that "if the carrier at the point of destination shall use due diligence to notify the consignee, and the goods are not taken by the consignee, and have in consequence to be stored in the depots or warehouses of the common carriers, they shall thereafter only be liable as warehousemen." *Rev. Stat. Texas*, art. 282. See the statute applied in *Missouri Pac. R. Co. v. Haynes*, 72 Tex. 175. See also *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116.

Vermont.—*Ouimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350; *Winslow v. Vermont, etc., R. Co.*, 42 Vt. 700, 1 Am. Rep. 365.

Wisconsin.—*Wood v. Crocker*, 18 Wis. 345, 86 Am. Dec. 773; *Wood v. Milwaukee, etc., R. Co.*, 27 Wis. 541, 9 Am. Rep. 465; *Parker v. Milwaukee, etc., R. Co.*, 30 Wis. 689, 7 Am. Ry. Rep. 255; *Lemke v. Chicago, etc., R. Co.*, 39 Wis. 449, 13 Am. Ry. Rep. 406; *Blackhaus v. Chicago, etc., R. Co.*, 92 Wis. 393. See also *Milwaukee, etc., R. Co. v. Fairchild*, 6 Wis. 403.

English Doctrine.—The doctrine of the English cases is substantially the same as the New Hampshire doctrine. The consignee of goods shipped by railway is entitled to a reasonable time, after the goods have arrived at their destination, within which to take them away, and during such time the goods are in the hands of the railway as carrier and subject it to all the liabilities which attach to that character. But when such reasonable time has elapsed,

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the company becomes liable as warehouseman merely. *Chapman v. Great Western R. Co.*, 5 Q. B. Div. 278, 49 L. J. Q. B. 420, 42 L. T. N. S. 252. In this case, COCKBURN, C. J., said: "The contract of the carrier being not only to carry, but also to deliver, it follows that, to a certain extent, the custody of the goods as carrier must extend beyond as well as precede the period of their transit from the place of consignment to that of destination. First, there is in most instances an interval between the receipt of the goods and their departure—sometimes one of considerable duration. Next, there is the time which, in most instances, must necessarily intervene between their arrival at the place of destination and the delivery to the consignee, unless the latter—which, however, is seldom the case—is on the spot to receive them on their arrival. Where this is not the case, some delay, often delay of some hours—as, for instance, when goods arrive at night, or late on a Saturday, or where the train consists of a number of trucks which take some time to unload—unavoidably occurs. In these cases, while, on the one hand, the delay, being unavoidable, cannot be imputed to the carrier as unreasonable, or give a cause of action to the consignor or consignee, on the other hand, the obligation of the carrier not having been fulfilled by the delivery of the goods, the goods remain in his hands as carrier, and subject him to all the liabilities which attach to the contract of the carrier. *A fortiori* will this be the case where there is unreasonable delay on the part of the carrier, if the consignee is ready to receive. The case, however, becomes altogether changed when the carrier is ready to deliver, and the delay in the delivery is attributable, not to the carrier, but to the consignee of the goods. Here again, just as the carrier is entitled to a reasonable time within which to deliver, so the recipient of the goods is entitled to a reasonable time to demand and receive delivery. * * * When once the consignee is *in mora* by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman. He ceases to be liable in case of accident." See also *Bradshaw v. Irish, North-Western R. Co.*, 7 Ir. R. C. L. 252, 21 W. R. 581.

Canada.—In *Richardson v. Canadian Pac. R. Co.*, 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413, the authority of *Chapman v. Great Western R. Co.*, 5 Q. B. Div. 278, was *recognized and followed*, the court, by ROSE, J., saying: "Having regard to the various cases, and after carefully analyzing the different authorities cited and referring more particularly to the case of *Chapman v. Great Western R. Co.*, 5 Q. B. Div. 278, I have come to the conclusion that the principle of law which must govern is this—that the consignee must have a reasonable time within which to take away the goods, and that reasonable time begins from notice or knowledge. What is notice or knowledge turns on the facts in each case, the custom of the carrier, and the practice of the party or consignee. It is laid down in [that case], the principles of which govern this case, that if notice by the carrier to the consignee is not absolutely necessary, there must be knowledge by the consignee of the date of the arrival of the goods, or such facts must exist as would charge him with neglect if he had not knowledge, and that time begins from knowledge either actual or imputed." The learned judge distinguished the case of carriers by water, saying: "*Bourne v. Gatliff*, 11 Cl. &

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F. 45, cited in *Mitchell v. Lancashire, etc.*, R. Co., L. R. 10 Q. B. 256, is the case which has been relied upon chiefly for that doctrine [that the railway company must give notice to free itself from liability.] That was the case of a ship. It is clear that in the case of a ship, where the time of arrival is uncertain, and where the consignee may not know with any degree of certainty when the vessel may arrive, the duty of the carrier is to give notice."

In earlier cases, the Massachusetts doctrine seemed to be announced, and it was declared that liability as a common carrier ceased as soon as the goods were received at their destination, and lodged in a place of safety. *Hall v. Grand Trunk R. Co.*, 34 U. C. Q. B. 517; *Bowie v. Buffalo etc.*, R. Co., 7 U. C. C. P. 191; *O'Neill v. Great Western R. Co.*, 7 U. C. C. P. 203; *Inman v. Buffalo, etc.*, R. Co., 7 U. C. C. P. 325.

Reasonable Time—Question for Jury.—The question being largely one of fact, is to be submitted to the jury in all cases where there is room for doubt in reasonable minds as to whether any specific period was a reasonable time under the circumstances of the particular case. *Coxon v. North Eastern R. Co.*, 4 Ry. & C. T. Cas. 284; *Broadwell v. Butler*, 6 McLean (U. S.) 296; *Derosia v. Winona, etc.*, R. Co., 18 Minn. 133, 8 Am. Ry. Rep. 363; *Roth v. Buffalo, etc.*, R. Co., 34 N. Y. 548, 90 Am. Dec. 736; *Hedges v. Hudson River R. Co.*, 49 N. Y. 223, 3 Am. Ry. Rep. 346, reversing 6 Robt. (N. Y.) 119; *Woods v. Milwaukee, etc.*, R. Co., 27 Wis. 541, 9 Am. Rep. 465, 2 Am. Ry. Rep. 342.

Where a company is sued for the loss of goods, if there is any doubt or question made as to whether they were lost while the company was liable as common carriers or as warehousemen, the question should be submitted to the jury; and if the jury fail to consider the question, upon being especially instructed to do so, it is ground for reversal. *Sessions v. Western R. Corp.*, 16 Gray (Mass.) 132. See also *Columbus, etc.*, R. Co. v. *Ludden*, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404; *Lamb v. Camden, etc.*, R., etc., Co., 2 Daly (N. Y.) 454.

The question whether a consignee has had a reasonable time in which to remove goods after their arrival at the place of destination is a question for the jury, if there be a conflict of evidence as to the material facts, or when the facts are doubtful; but if the evidence is undisputed, or the facts few and simple, the question what is a reasonable time may be decided by the court. *Lemke v. Chicago, etc.*, R. Co., 39 Wis. 449, 13 Am. Ry. Rep. 406; *Frank v. Grand Tower, etc.*, R. Co., 57 Mo. App. 181.

Whether Notice to Consignee is Essential.—See *Allen v. Pennsylvania R. Co.*, (Penn., 1897,) 10 Am. & Eng. R. Cas., N. S., 347, and notes p. 352, *et seq.*

Validity of Contracts Limiting Liability—General Doctrine.—The doctrine universally recognized is that a carrier may, by special contract, stipulate against liability for any loss, provided such loss is not the result of the carrier's own negligence or that of its servants. *Peck v. North Staffordshire R. Co.*, 10 H. L. Cas. 473, 32 L. J. Q. B. 241; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Muser v. Holland*, 17 Blatchf. (U. S.) 412; *Mobile, etc.*, R. Co. v. *Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Taylor v. Little Rock, etc.*, R. Co., 32 Ark. 398, 29 Am. Rep. 1, 39 Ark. 148, 18 Am. & Eng. R. Cas. 590; *Merchants' Dispatch, etc.*, Co. v. *Cornforth*, 3 Colo. 230,

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25 Am. Rep. 757; Welch v. Boston, etc., R. Co., 41 Conn. 333; Purcell v. Southern Express Co., 34 Ga. 315; Black v. Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628, 25 Am. & Eng. R. Cas. 388; Wabash, etc., R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705, 18 Am. & Eng. R. Cas. 1; Bartlett v. Pittsburgh, etc., R. Co., 94 Ind. 281, 18 Am. & Eng. R. Cas. 549; McCoy v. Keokuk, etc., R. Co., 44 Iowa 424; Kansas Pac. R. Co. v. Reynolds, 17 Kan. 251; Rhodes v. Louisville, etc., R. Co., 9 Bush (Ky.) 688; Simon v. Steamship Fung Shuey, 21 La. Ann. 363; Willis v. Grand Trunk R. Co., 62 Me. 488; Buckland v. Adams Express Co., 97 Mass. 124; 93 Am. Dec. 68; Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360, 1 Cent. L. J. 375; Mobile, etc., R. Co. v. Weiner, 49 Miss. 725; Oxley v. St. Louis, etc., R. Co., 65 Mo. 629; Atchison, etc., R. Co. v. Washburn, 5 Neb. 117; Hall v. Cheney, 36 N. H. 26; Ashmore v. Pennsylvania Steam Towing, etc., Co., 28 N. J. L. 180; Lee v. Raleigh, etc., R. Co., 72 N. Car. 236; Erie R. Co. v. Lockwood, 28 Ohio St. 358; Farnham v. Camden, etc., R. Co., 55 Pa. St. 53; Levy v. Southern Express Co., 4 S. Car. 234; Dillard v. Louisville, etc., R. Co., 2 Lea (Tenn.) 288; Galveston, etc., R. Co. v. Allison, 59 Tex. 193, 12 Am. & Eng. R. Cas. 28; Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567; Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654; Brown v. Adams Express Co., 15 W. Va. 812; Detroit, etc., R. Co. v. Farmers', etc., Bank, 20 Wis. 122.

Same—Effect of Carrier's Negligence.—See 7 Am. & Eng. R. Cas., N. S., note 575, *et seq.*

THOMAS

v.

NORTHERN PAC. EXP. CO.

(Supreme Court of Minnesota, July 1, 1898.)

Carriers of Freight—Delivery.*—When a common carrier has, on demand of the true owner, having a right of possession, delivered to him the property bailed, it is a complete justification for non-delivery according to the direction of the bailor.

Same—Notice to Bailor.—It is not necessary to give the bailor notice of such delivery, distinguishing the case in that respect from one where the property has been taken from the carrier on legal process against the bailor.

Right of State to Game Unlawfully Killed—Commingleing—Burden of Proof.—Where wild game has been caught or killed at a time or in a manner prohibited by statute, it remains the property of the state, and may be reclaimed by it as the true owner. Where game unlawfully killed has been commingled with game lawfully killed, the burden is upon the possessor to prove as against the state what part was lawfully killed, and thereby became his property.

(Syllabus by the Court.)

*See note at end of case.

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APPEAL by defendant from municipal court of Minneapolis. *Reversed.*

T. E. Byrnes, for appellant.

A. L. Brice, for respondent.

MITCHELL, J. This action was brought to recover damages for the failure of the defendant to deliver to the consignees several small consignments or shipments of fish which plaintiff had delivered to the defendant as a common carrier, for transportation and delivery to the consignees. The substance of the defense was that the fish had been caught in the state of Minnesota with nets, contrary to law and consequently still belonged to the state; and that they were taken from the possession of the defendant by the state through its agent the game warden. In short, the defendant justified its nondelivery to the consignees by a delivery on demand to the rightful owner. The trial court found "that part of each of the shipments was fish illegally caught, with a fish net, but from the evidence it was impossible to determine what amount was illegally caught, and what was the value and quantity of the fish legally caught." As a conclusion of law from these facts the court held that the plaintiff was entitled to recover of the defendants the value of all the shipments, for the reason that "it did not appear that notice of such seizure was immediately given either to the plaintiff or the consignee." The learned judge evidently confounded two entirely distinct defenses which a common carrier may interpose as a justification for nondelivery of property to the consignee, to wit: First, that he delivered the property on demand to some one else, who was the rightful owner, and entitled to the possession of it; and, second, that the property was taken from his possession on legal process against his bailor, and that he immediately notified his bailor of the fact. The first is always a sufficient defense of a bailee against the claim of the bailor, and there is no difference in this regard between a common carrier and any other

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bailee. The Idaho, 93 U. S. 575 ; Hutch. Carr. § 404. To constitute the second defense the bailee must promptly notify his bailor of the seizure so as to give him the opportunity to defend his title. The law does not require a common carrier to defend a title of which he presumably knows nothing, but in the case of seizure on legal process it does require him to notify his bailor so the latter may defend. Where the carrier delivers the property, on demand, to one claiming to be a rightful owner, he of course assumes the burden of proving, as against the claim of his bailor, that such person was the rightful owner; but we know of no rule of law requiring him to give notice to his bailor of such delivery. All of the authorities cited by plaintiff's counsel are cases where the property had been taken from the carrier by legal process. But in this case the game warden, as agent of the state, claimed and took it as its property. Wild game belongs to the state in its sovereign capacity. No person can acquire any property in it except by catching or killing it at the time and in the manner authorized by law. If a person catches or kills it at a time or in a manner prohibited by statute, it still remains the property of the state, which may reclaim it. State v. Rodman, 58 Minn. 393, 59 N. W. 1098. The court does not find by whom or with what intent the fish legally caught were commingled with those illegally caught. In view of the evidence, they must have been intermingled either by the plaintiff or by the fisherman who caught them, and from whom plaintiff bought them. Neither does the court find that they were incapable of being distinguished, but merely that it was impossible to determine from the evidence what amount was legally and what amount was illegally caught. We do not find it necessary to go into a general discussion of the law relating to the confusion of goods, nor do we think that a case where goods, a part of which confessedly belonged to each of two different persons, are intermingled, is entirely analogous. We have here

Same—Notice to
Bailor.Right of State to
Game Unlawfully
Killed—Comming-
ling—Burden of
Proof.

Note

a case where all of the property originally belonged to the state, and no one could acquire any right to or in it except by catching it at a time and in a manner authorized by statute. At least a part of it still belongs to the state, because caught in an illegal manner. If any person claims that another part, commingled with it, was caught in a legal manner, and thereby became his property, we think the burden is on him to show what part belongs to him, and not on the state to prove what part belongs to it. Where game or fish illegally killed or caught is commingled with that which was legally killed or caught, any other rule would in many cases render it very difficult to enforce the provisions of the game laws. Order reversed, and a new trial granted.

NOTE.

Carriers of Freight—Delivery to True Owner—Effect.—The carrier is always justified in delivering goods to their true owner, although it must assume the responsibility of determining who is such owner where it undertakes to deliver to some one other than the consignee or the legal holder of the bill of lading. In *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 37 Am. & Eng. R. Cas. 719, the court by BARCLAY, J., said: "Undoubtedly a carrier in some circumstances may deliver goods to the true owner instead of to him who gave them into its charge for carriage. Its contract * * * is to carry and deliver (according to shipper's orders), or to account for the goods. It would be a lawful accounting to show that they had been delivered to the real owner upon his demand. * * * But to justify a delivery to the true owner contrary to or without the orders of the shipper, the carrier assumes the burden of proving the ownership at the time of such delivery. Among other things it must establish the immediate right of possession in the person to whom such delivery is made." *Citing The Idaho*, 93 U. S. 579, 11 Blatchf. (U. S.) 218; *Western Transp. Co. v. Barber*, 56 N. Y. 544. See also *Wells v. American Express Co.*, 55 Wis. 23, 42 Am. Rep. 695, 6 Am. & Eng. R. Cas. 300.

Where the carrier surrenders possession of the goods to the person whom it ascertains, in the course of transit or before final delivery, to be the real owner, it is discharged from further liability. Story on Bailm. (9th ed.), § 582; *King v. Richards*, 6 Whart. (Pa.) 418; 37 Am. Dec. 420; *Floyd v. Bovard*, 6 W. & S. (Pa.) 75; *Bates v. Stanton*, 1 Duer. (N. Y.) 79; *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670; *Rosenfield v. Express Co.*, 1 Woods (U. S.) 131; *Hardman v. Wilcock*, 9 Bing. 382, *note*, 23 E. C. L. 312, *note*; *Biddle v. Bond*, 6 B. & S. 225, 118 E. C. L. 225. Compare, however, *Kohn v. Richmond, etc. R. Co.*, 37 S. Car. 1, 34 Am. St. Rep. 726.

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In *Shellenburg v. Fremont, etc., R. Co.*, 45 Neb. 487, the court by Post, J., said: "It was formerly held that where a bailee of goods delivered them to the rightful owner, he would, notwithstanding that fact, be answerable to the bailor without title thereto. The reason for the rule was that a bailee, having recognized the bailor as the owner, should not be permitted to dispute the latter's title. But according to the modern rule, as recognized in this country and in England, it is a sufficient excuse for the nondelivery of personal property for the bailee to show that he has surrendered it to the rightful owner." Citing *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670; *Hardman v. Wilcock*, 9 Bing. 382, note, 23 E. C. L. 312, note; *Cheesman v. Exall*, 6 Exch. 341.

HINTON *et al.*

v.

EASTERN RY. CO. OF MINNESOTA.

(*Supreme Court of Minnesota, May 23, 1898.*)

Carriers of Freight—Contract Limiting Liability—Burden of Proof.*—*Held* (following *Shea v. Railway Co.*, 65 N. W. 458, 63 Minn. 228), that the burden of proof is upon a common carrier, who claims that, by reason of an exception in the bill of lading, he is not liable for the loss sued for, to show, not only that the cause of the loss was within the exception, but also that there was no negligence on his part.

Duty of Carrier—Instructions.—This was an action against a carrier for damages for injury to merchandise while in its possession. *Held*, that the trial court rightly refused to instruct the jury that the measure of the defendant's duty was that which was usual and customary for other carriers to do under like circumstances.

Evidence and Verdict.—Evidence considered and *held*, that it sustains the verdict, and that the damages awarded are not excessive.

(Syllabus by the Court.)

APPEAL by defendant from Hennepin county district court. *Affirmed.*

W. E. Dodge, for appellant.

Stiles & Stiles, for respondents.

START, C. J. Action to recover damages which the plaintiffs claim to have sustained on account of the

*See *Newberger Cotton Co. v. Illinois Cent. R. Co.*, 10 Am. & Eng. R. Cas., N. S., 334, and note p. 335 *et seq.*

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freezing of 6,600 barrels of apples while they were in the possession of the defendant as a common carrier, as the result of its negligence. Verdict for the plaintiffs for \$6,600. The defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial.

1. The defendant's first claim is that neither the allegations of the complaint, nor the facts proven on the trial, show or tend to show that the injury to the apples was caused by its negligence. The complaint charges defendant's negligence in these words: "Defendant failed to use reasonable and ordinary care in handling and transportation of said apples as a common carrier, but, on the contrary, so negligently and carelessly conducted itself that, while said apples were in its custody as such common carrier, the same became frozen and thereby depreciated in value, to the damage and," etc. This is a sufficient allegation of appellant's negligence. *Clark v. Railway Co.*, 28 Minn. 69, 9 N. W. 75; *Keating v. Brown*, 30 Minn. 9, 13 N. W. 909; *Rolseth v. Smith*, 38 Minn. 14, 35 N. W. 565. The apples were delivered to the Rome, Watertown & Ogdensburg Railroad Company, at Hamlin, N. Y., to be carried over its line to Buffalo, thence by the Northern Steamship Company's line to West Superior, and thence over the defendant's railway to their destination, Minneapolis. These several lines constituted a continuous line from Hamlin, N. Y., to Minneapolis. Bills of lading were delivered to the plaintiffs as the shipments were made, which the trial court, in its instructions to the jury, held to have been made and accepted in consideration of a lower freight rate, and to contain a valid agreement to the effect that neither the initial nor any connecting carrier should be liable for loss or damages to the apples so shipped which was caused by changes in the weather, heat, frost, or decay, and that, in case of any claim for damages, it should be made in writing to the agent at the

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point of delivery, promptly, and within 30 days after the arrival and delivery of the property. The instruction was not excepted to by either party. The plaintiffs offered ample evidence on the trial to establish the fact that the apples were properly packed and delivered to the initial carrier in good condition, and that when they were delivered to the plaintiff by the defendant at Minneapolis, the place of their destination, they were in a damaged condition, having been frozen in transit. The defendant claims that the fact so established did not shift the burden upon it, as the last carrier, to show that it was not negligent in the premises. Its claim in this respect is this: "The loss having been brought within the terms of the exception, since it is alleged that the sole damage was caused by frost, it would seem to follow that proof of the mere fact of freezing does not raise the presumption of defendant's negligence, since the parties clearly contemplated that such loss might occur without negligence." This precise point was directly involved, argued, and decided in the case of *Shea v. Railway Co.*, 63 Minn. 228, 65 N. W. 458, which was an action to recover for injury to a quantity of oranges by frost while in transit. The bills of lading in that case exempted the carrier from liability for damages by frost or heat, and this court held that it was not sufficient for the carrier to show that the loss was within the terms of the exception, but it must also show that there was on its part no negligence in the premises. Upon principle and authority, the *Shea* case was correctly decided, and we adhere to it. It is further claimed by defendant that it overcame the presumption of negligence on its part by showing that the apples must have been frozen when they were delivered to it at West Superior, and that from the time it received them until they were delivered to the plaintiffs it did all that a prudent and skillful carrier could have done under the circumstances to prevent the injury. There was evidence given on the trial tending to support this contention, but it was not conclusive; and upon the whole

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evidence, our conclusion is that the question of the defendant's negligence was one of fact, for the jury, and that the verdict is sustained by the evidence.

2. The defendant assigns as error the rulings of the trial court in admitting evidence tending to show that the defendant's Minneapolis agent solicited the shipment of the apples over its and the other connecting lines, and that he was advised when the shipments would commence, and approximately, the number of car loads. This evidence was proper in rebuttal, as the defendant gave evidence tending to show that its agent at West Superior had no notice of the shipment until within 48 hours of the arrival there of a cargo of 24 car loads of the apples on a steamer, and that the defendant had only a limited time in which to prepare to receive, care for, and transport such an unusually large shipment of apples at that season of the year, the time being November 29th, and the weather very cold. The plaintiff was also permitted, over the objections of the defendant, to give evidence tending to show that the freight rate actually agreed upon by the parties was less than the rate actually charged. The purpose of this evidence was to show that there was no consideration for the contract in the bills of lading for a limited liability, but the court expressly charged the jury that there was a consideration for such contract. Therefore the admission of the evidence was harmless error, if any.

3. The defendant further claims that written notice of of plaintiff's claim was not given to the agent at the point of delivery within 30 days after the delivery of the apples, as required by the bills of lading. The evidence shows that such notice was made and served upon Mr. Brann, the agent of the defendant at the point of delivery (Minneapolis), who was also agent for the Great Northern Railway Company at that point, and that the last-named company actually made the delivery. The notice, however, was directed to Mr. Brann as agent of the Great Northern Railway Company, and to that company. The notice was a substantial com-

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pliance with the condition of the bills of lading.

4. The defendant requested to be given, and the trial court refused to give, this instruction: "you must necessarily, as jurors, determine the responsibility of individual conduct; but you cannot be allowed to set up a standard of conduct which shall, in effect, dictate the custom or control the business of the community. The measure of the defendant's duty is, what was it usual and customary for other carriers in this part of the country to do under similar circumstances?" This was properly refused, for it assumes, as a matter of law, that, if the defendant did in the premises what was usual and customary for other carriers to do, it was not guilty of negligence. Proof of the general custom of other carriers under like circumstances was competent, as tending to show that the defendant was not negligent; but such evidence was not conclusive, even if undisputed. *O'Malley v. Railway Co.*, 43 Minn. 289, 45 N. W. 440; *Flanders v. Railway Co.*, 51 Minn. 193, 53 N. W. 544.

Duty of Carrier—
Instructions.

5. Lastly, the defendant claims that the damages awarded are excessive. The evidence on the part of the plaintiffs fairly tends to show that the apples, at the initial point of delivery, were of the value of one dollar per barrel, and that when they were received at Minneapolis the average value of the entire lot was less than the freight paid thereon by them, and that this depreciation in value was due to the fact that the apples had been frozen. This evidence sustains the finding of the jury that the damages were \$6,600, or an average of \$1 per barrel. Order affirmed.

Evidence and
Verdict.

Burgher v. Chicago, R. I. & P. R. Co

BURGHER

v.

CHICAGO, R. I. & P. R. Co.

(Supreme Court of Iowa, May 11, 1898.)

Contracts of Shipment—Parole Evidence.—In an action for injury to stock from delay in transportation, in the absence of mistake or fraud, evidence of verbal agreements, claimed to have been made by the contracting parties prior to the written contract of shipment, is inadmissible to change the obligations of the parties as stated in such contract.

Same—Authority of Shipper's Agent.—Where it appeared from the evidence that plaintiff was chargeable with notice that the cattle would not be shipped until a contract was signed and that defendant's agent would understand from plaintiff's telegrams that the person in charge of the stock at defendant's station was acting for plaintiff, plaintiff cannot repudiate the written contract signed in his behalf by such person, and is bound according to its terms.

Same—Limiting Liability.—Under the law of Kansas a railroad company may limit its common-law liability as a carrier of freight except for negligence.

Failure to Attend Cattle—Liability of Company.*—The stock suffered injury through failure on the part of plaintiff's agent to attend to them, it appearing from the contract of shipment that he was in sole charge of the stock "for the purpose of attention and protection of the stock while in transit." *Held*, that the company was not liable.

APPEAL by plaintiff from Davis county district court. *Affirmed*.

Payne & Sowers, for appellant.

Carroll Wright and *S. S. Carruthers*, for appellee.

GIVEN, J. 1. The pleadings and proofs are somewhat lengthy, and need not be set out in full. The following is a sufficient statement thereof for an understanding of the issues to be considered:

Case Stated.

Agra, Kan., Ellis, Neb., and Centerville, Iowa, are stations on defendant's railway. Some days prior to September 9, 1895, the plaintiff, contem-

*See note at end of case.

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plating the shipment of one car load of cattle from Agra and one from Ellis to Centerville, called upon the defendant's station agent at Ellis for terms upon which the cattle would be shipped over the defendant's road. There being another line over which defendant could ship, he evidently desired to avail himself of the competition and to secure the most favorable terms. The defendant had in force two rates for the shipment of this class of freight, the higher rate to apply where no limitations of the strict common-law liability of the carrier was made, and the lower rate to apply when such liability was limited. Said agent at Ellis communicated by wire with defendant's general freight agent as to the rates that would be allowed to plaintiff from Ellis and from Agra, and informed the plaintiff of the answer. On the morning of September 9, 1895, the car load of cattle at Agra was loaded and shipped, one Ed Burgher being carried on the train on a shipper's pass as the person having charge of the cattle. On the evening of the same day the cattle at Ellis were loaded and carried hence in a fast freight train, the plaintiff being on the train and in charge of said cattle. The car load of cattle from Ellis arrived at Centerville on time and in good order, but the car load from Agra did not arrive at Centerville until about 5 o'clock p. m., September 11th. These cattle from Agra were not fed or watered, or the milch cows milked, while on the road, in consequence of which they were materially depreciated in value, and it is for this depreciation that plaintiff seeks to recover damages.

2. Plaintiff alleged and introduced evidence tending to show that he had entered into an oral contract with the defendant's agent at Ellis for the shipment of both cars of cattle; that it was agreed that the car from Agra would be shipped so as to reach Ellis on the evening of the 9th, in time to be taken into the fast freight train in which the car from Ellis was carried, so that plaintiff could accompany both cars, and so that they would ar-

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rive at Centerville on the time of that train, without the necessity of feeding, watering, or milking on the way. The defendant denies that its agent at Ellis had authority to, or did, make any contract for the shipment of the cattle from Agra, and denies that he had authority to, or did, make any other contract for the shipment from Ellis than the one made in writing. It appears that on the 9th of September, and before the shipment of the cattle from Ellis, the plaintiff, as owner and shipper, and the defendant, by its station agent at Ellis, executed a written contract for the shipment from Ellis. It also appears that, before the shipment of the cattle from Agra, Ed Burgher and the defendant, by its station agent at Agra, executed a like written contract for the shipment of the cattle from Agra. Appellant contends that Ed Burgher had no authority to execute said last-named contract, and prays that the same be reformed by inserting the plaintiff's name as the owner and the shipper of the cattle. The district court so reformed said contract, and of this the defendant does not complain. This reformation is manifestly correct. Therefore, that contract will be considered as if the name of the plaintiff appeared therein as owner and shipper. We are in no doubt from all the circumstances, especially from the correspondence by wire that passed between plaintiff and Ed Burgher on the 8th and 9th of September, that Ed Burgher was authorized to represent the plaintiff in paying for and shipping the cattle from Agra, and that instead of executing the shipping contract in his own name he should have executed it for and in the name of the plaintiff. It is not claimed that any oral contract was made after the execution of these written contracts, and it is clear that whatever was said between the plaintiff and the agent at Ellis as to the terms of the shipments was said prior to the execution of the written contracts. Therefore the district court properly held that in the absence of fraud or mistake, evidence as to said oral communications was inadmissible. We may say, further, that, even if said declarations were competent, we think

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they fail to show authority in the agent at Ellis to contract for the shipment from Agra, or that he did so contract. All that he did was to inform the plaintiff of the rates given by the general freight agent, which were the rates at which the shipments were made; also to inform him of his understanding as to the time and connection of trains.

3. With respect to the authority of Ed Burgher, it appears that the plaintiff was not at Agra, and had no personal communications with the defendant's agent at that station in regard to the shipment. The cattle were brought in and loaded by a Mr. ^{Same—Authority of Shipper's Agent.} Fauts, for the plaintiff. Ed Burgher, 20 years of age, a nephew of the plaintiff, who resided with the plaintiff in Iowa, was at Agra on a visit, and with plaintiff's permission was to return to Iowa with the cattle on a shipper's pass. There seems to have been some delay in the receipt of the money with which the Agra cattle were to be paid for, and on September 8th and 9th telegrams passed between Ed Burgher, at Agra, and the plaintiff, at Ellis, as follows: On the 8th Ed Burgher wired plaintiff: "Money has not come." Plaintiff answered: "Tell one man to stay with cattle. Pay his expenses. If money not there morning, I will be there to-morrow." Ed Burger answered: "Money has not come. Cattle here." Plaintiff replied: "Money was expressed yesterday from Beatrice. If not satisfied, answer." On the 9th Ed Burgher answered: "Cattle paid for. Will come on 96 this morning." These messages were transmitted and received by the defendant's agents at Agra and Ellis. Plaintiff must have known that the cattle were not to be shipped from Agra until a contract was signed, and that the agent at Agra would understand from said messages that Ed Burgher was acting for the owner. There is no claim that the agent at Agra, who alone could contract for the shipment from that point, did make any other contract than that expressed in the writing. The plaintiff asks that said written contract be reformed so as to express the agreement as alleged

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to have been orally made with the agent at Ellis, but, in view of the conclusion already announced with respect to that alleged contract, such reformation cannot be granted. We are clearly of the opinion that the rights of the parties as to the damages claimed must be measured by the written contract under which the shipment from Agra was made, reformed only by inserting the name of the plaintiff as owner and shipper of the cattle.

4. We now inquire whether, under the written contract as thus reformed, the defendant is liable for the damages caused to the cattle shipped from Agra because of their not having been fed, watered, and milked while in transit. Said contract provides: "That, for and in consideration of rates named and privileges above enumerated, the said Aron Burgher, Jr., agrees to ship one car of cattle (29 head more or less) from Agra, Kan., to Centerville, Iowa, and said railway company agrees to receive and haul the same." Immediately following this, said contract provides as follows: "Which stock is to be loaded and unloaded, watered and fed by the said Ed Burgher (Aron Burgher, Jr.), or his agent. And in consideration of free transportation for one person, hereby given by said railway company, such person to accompany the stock, it is agreed that the car containing the stock of said Burgher is in sole charge of said person or his agents, for the purpose of attention and protection of the stock while in transit, and the company assumes no responsibility for safety to stock in charge of shipper or his agents, whether from theft, heat, jumping from car, injury in loading or unloading, injury or damage which stock may do to themselves, or which may arise from the reasonable delay of trains, or from any other cause, or accident or injury, except those occurring by gross negligence of the company." The rate named was the lower rate allowed when liability was limited. There is no provision in the contract as to the train or routes by, or the time in which the cattle should be car-

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ried. It is undisputed that, if that part of the contract quoted above is to control, the defendant is not liable for the damage caused to the cat-
tle for want of feed, water, and milking.

Same—Limiting
Liability.

Plaintiff contends that that part of said contract is in violation of the constitution of the state of Nebraska and the statutes of Kansas, and is therefore invalid.

As we find that the only contract made for the shipment of the cattle from Agra was made in Kansas, we need not inquire as to the provision of the constitution of Nebraska. The statute of Kansas and the order of its board of railway commissioners are admitted to be correctly set out in the answer. Section 13 of the act approved March 6, 1883, creating the board of railroad commissioners is as follows: "No railroad company shall be permitted, except as otherwise provided by regulation or order of the board, to change or limit its common-law liability as a common carrier." On September 1, 1893, said board of railroad commissioners, under authority of said section, promulgated an order providing as follows: "That hereafter where any railroad company doing business in the state of Kansas shall have in force two rates for the shipment of any class of freight within said state, the higher rate to apply to such shipments where no limitation of the strict common-law liability of said railroad company is made, and the lower rate to apply when such liability is limited, it shall be lawful for such railway company, by contract entered into between such company and any shipper, to change or limit its common-law liability in such manner and to such extent as may be specified by the terms of said contract: provided that such contract shall not relieve such railroad company from any liability on account of the negligence of such company." As already stated, defendant had in force two rates, and this shipment was made at the lower rate, and is therefore within the authority given in this order. Appellant quotes a statute of Kansas providing that railroads shall be liable for all damage to person or property, when done in consequence of

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any neglect on the part of the railroad companies. Surely, railroad companies are liable for neglect, but the inquiry here is whether this contract is valid, and, if so, whether under it it was the duty of the defendant or of the person in charge of the cattle to feed, water, and milk them. Appellant refers to section 4032 of the code of 1873 which makes it a misdemeanor for any railway company, owner, or custodian of animals to confine the same in cars for a longer period than 28 consecutive hours without unloading for rest, water and feeding, "unless delayed by storm or other accidental cause." Clearly, the carrier is not liable in damages to the owner, where the neglect is that of the owner or custodian. This contention is fully answered in the recent case of *Grieve v. Railroad Co.* (Iowa) 74 N. W. 192. Section 2074 of our Code is as follows: "No contract, receipt, rule or regulation shall exempt any railroad corporation engaged in transporting persons or property, from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into." The contract in that case was identical with this as to the care of the cattle in transit. In that case it is said: "But the company had the right to employ the plaintiff by furnishing him transportation to accompany the stock, load and unload, water, and feed it; and if he actually undertook to do this, and injury was occasioned by his negligence, it is not perceived on what theory the carrier may be held responsible. In such a case damages resulted not from any lack of care on the part of the carrier, but from that of the owner. * * * Now, if the owner undertakes to oversee the transportation of his stock and to attend to loading and unloading it, feeding and watering it, whether by contract or voluntarily, and it suffers injury through his fault he cannot recover, though the contract in no way relieves the company from liability."

5. Accepting the written contract as controlling, we now inquire whether the defendant is liable for the

Note

damage caused to the cattle by reason of their not having been fed, watered, and milked while in transit. Ed Burgher was authorized by the plaintiff to be and was carried on the train with these cattle on a shipper's pass, and as the person in whose sole charge the cattle were, "for the purpose of attention and protection of the stock while in transit." The cattle were unloaded and kept in a stockyard all of the first night out, but were not fed, watered, or milked. It does not appear that Ed Burgher at any time asked that the cattle be fed, watered, or milked. The fact is that plaintiff, expecting that car to be in the same train with the car which he accompanied, did not furnish Ed Burgher with money to buy feed, and Ed Burgher did not ask the defendant's agents to furnish the feed, and charge it on the way-bill, as he might have done. It is entirely clear that under the contract the duty of caring for the cattle in these respects was upon the plaintiff, and not upon the defendant. No doubt, if the Agra cattle had arrived in time to be carried from Ellis in the same train with the Ellis cattle, this damage would not have resulted; but the defendant did not contract that the Agra cattle should be so carried, and it was plaintiff's neglect that he did not provide for their care in the event of their being carried by a different train or over a different route. After a most careful consideration of the case, we reach the conclusion that the judgment of the district court should be affirmed.

NOTE.

Carriers of Live Stock—Liability Where Shipper Assumes Duty of Caring for Stock.—The duty as to the care of the stock, feeding and watering them, may be imposed upon the shipper or owner by the terms of the contract of shipment. If the shipper volunteers or undertakes to assume this duty, he alone is responsible for a neglect to discharge it. *South, etc., Alabama R. Co. v. Henlien*, 52 Ala. 606, 23 Am. Rep. 578; *Western R. Co. v. Harwell*, 91 Ala. 340, 45 Am. & Eng. R. Cas. 358; *Central R. Co. v. Bryant*, 73 Ga. 722; *Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550; *Cragin v. New York Cent.*

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R. Co., 51 N. Y. 61, 10 Am. Rep. 559; *Heineman v. Grand Trunk R. Co.*, 31 Eow. Pr. (Buffalo Super. Ct.) 430.

Where the shipper contracts that "in case of accidents to or delays of time from any cause whatever" he "is to feed, water, and to take proper care of the stock at his own expense," he cannot recover for injuries resulting from his failure to perform his undertaking, although the carrier may have consumed more time than was necessary in the transportation. *Boaz v. Central R. Co.*, 87 Ga. 463.

If the shipper contracts to accompany the stock and assume control of them, he cannot recover for a loss or injury to them in course of transportation unless his declaration alleges that the loss or injury was not due to his own neglect of duty. *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129, 32 Am. St. Rep. 239.

See *Grieve v. Illinois Cent. R. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 669, and *note*, p. 674.

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v.

POSTEN.

(*Supreme Court of Kansas, June 11, 1898.*)

Injury to Passenger—Collision on Leased Track—Liability.—Under the terms of the articles of agreement made between the Union Pacific Railway Company and the Chicago, Kansas & Nebraska Railway Company on the 17th of March, 1887, for the joint use of the track of the former between Topeka and Kansas City, the train hands in charge of a train belonging to the C., R. I. & P. Ry. Co., successor to the latter company, while on the U. P. track, are to be deemed the employees of the C., R. I. & P. Co., and the latter company and its assigns are liable for injuries to passengers on a train of the former for injuries caused by the negligence of the employees in charge of a train of the latter.

Damages—Evidence.*—On the trial of an action to recover damages for personal injuries preventing the plaintiff from transacting his ordinary business, evidence of the character and extent of such business, to which he devoted his personal attention and of the profits derived therefrom, may be given at the trial; but speculative profits, and profits on invested capital, are not recoverable as damages.

Limiting Liability.*—An attempt of a railway company or its receivers operating its property to limit, without an order of the board of railroad commissioners, its common-law liability for injuries to a passenger resulting from the negligence of its employees, is prohibited by section 17 of chapter 69 of the General Statutes of 1897, and a provision in a stock pass attempting to limit such liability to \$1,000 is invalid.

(Syllabus by the Court.)

*See notes at end of case.

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ERROR by defendant from Cloud county district court.
Affirmed.

M. A. Low, W. F. Evans, A. L. Williams, N. H. Loomis, and R. W. Blair for plaintiffs in error.

Shaffer & Savery, for defendant in error.

ALLEN J. The plaintiff was injured in the same collision considered in the preceding case of *Railway Co. v. Martin*, 53 Pac. 461. Plaintiff recovered judgment in the district court against both defendants for \$8,000. The findings of the jury upon all essential questions of fact relating to the cause of the collision are substantially the same as in the preceding case, and it is not deemed necessary to again recite them. In this case, however, the contract under which the trains of the Rock Island Company were operated over the Union Pacific tracks between Topeka and Kansas City was put in evidence. Counsel for the Rock Island Company again argue in the brief with great earnestness and at length that the trains of their company while on the Union Pacific tracks are wholly under the control of the receivers, and that they alone are liable for accidents resulting from the mismanagement of trains. The first article provides for connecting the tracks of the two companies at North Topeka, Kansas City, and Armstrong, and lets to the Rock Island Company the joint use of the Union Pacific tracks between these points, with equal privileges to the engines and trains of both roads thereon. The second article fixes the rental to be paid, which is made up partly from percentage on the investment, partly from the taxes and expenses in repairing the property, and "a proportional share of the expenses actually incurred in paying reasonable salaries to switchmen, telegraph operators, train dispatchers, and such other employees as may be employed in the performance of the duties incident to the joint use and occupation of said railway, as well as a like share of expenses for water supply." In the third article provision is made excluding the Rock Island Company

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from local business to and from intermediate points, and providing for joint schedules for the movement of trains, and for rules and regulations for the operation thereof to be made by the Union Pacific for the government of trains of both companies. It is also provided that "all trains shall move under and in accordance with the orders of the superintendent, or train dispatcher, of the party of the first part, who shall, as nearly as may be practicable, secure equality of right and privilege to all trains of the same class." The fifth clause of the third article reads: "Each party shall be liable as well to the other as to all third persons for all injuries and damage done by the running of its trains, or by the misconduct, carelessness, or neglect of its employees; and in case of collision between the trains of the two parties the one in fault shall sustain and pay all damages, or, if neither is at fault, each shall bear its own loss and damage." From these provisions, as well as from the

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general context of the agreement, it is perfectly clear that the Rock Island is responsible for the conduct of its employees in the operation of its trains over the Union Pacific tracks, and that the management of Rock Island trains by employees of the Union Pacific Company is confined to orders and regulations in reference to their movements. For keeping the tracks and other Union Pacific property in repair, the Union Pacific Company is primarily responsible, but for the conduct, skill, and diligence of the trainmen in the operation of the trains of the Rock Island Company it clearly is answerable both to its own passengers and to all others affected thereby. The negligence for which the Rock Island was held liable was the negligence of the engineer and other trainmen employed by it, and in charge of its train. We are not called on to consider any question concerning its liability for the negligence or mismanagement of train dispatchers, telegraph operators, switchmen, or other persons, employed by the Union Pacific, but whose duties relate to the trains of both companies.

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We find no fault in the ninth instruction. It certainly states, in substantially the usual form, the correct measure of the plaintiff's recovery in case a verdict should be rendered in his favor. The criticism of counsel, however, is not so much on the instruction itself as of the evidence on which it was based. The claim is that as to earning capacity no competent evidence was offered, but that, on the contrary, incompetent evidence of the plaintiff's profits in his business was introduced over the defendant's objection. The plaintiff himself testified that he was a farmer, feeder, and shipper of stock, and that in the year 1892 his profits were about \$2,000, and in 1893 about \$4,000; that that included the two years previous to the accident, and that since then he had not been able to attend to that business, nor business of any kind. It is said that this income, being derived from invested capital, as well as the personal attention of the plaintiff, did not furnish a proper measure of damages; that profits of the kind realized were speculative; that, while profits might be made in one year, losses might be sustained to another. The contention is sound so far as it relates to the rule by which the plaintiff's damages are to be measured, but it is not sound as to the proposition that testimony with reference to the plaintiff's employment, and the nature and character of his business, and whether it is profitable or otherwise, may be admitted in evidence. Certainly evidence as to earnings in cases of this kind is not necessarily confined to wages. It is not alone wage earners whose time is valuable, and who may recover damages for injuries resulting in the loss of it. In order that the jury may intelligently estimate the loss the plaintiff has sustained, it is necessary that they should be informed with reference to his business affairs; and while they may not, as compensation for the loss of his time, include speculative profits or profits on invested capital, it is for them to say what loss has resulted to his business because of his being incapacitated from attending to it, and to award him as damages the value of his time and

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ence.

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labor to himself in the transaction of his own business. This is the same recovery, and for precisely the same reasons, that a clerk or agent doing the same work for wages might recover for his loss. In 3 Suth. Dam. § 945, it is said: "Evidence of the loss sustained by the plaintiff in his business in consequence of the injury received is proper, not as furnishing the measure of damages, but to aid the jury in estimating them; and for this purpose the nature of such business, its extent, and the importance of his personal oversight and superintendence in conducting it, may be shown." This view of the law is sustained in the following cases: *Kinney v. Crocker*, 18 Wis. 80; *Stafford v. City of Oskaloosa*, 64 Iowa, 251, 20 N. W. 174; *City of Ripon v. Bittel*, 30 Wis. 614; *Wade v. Leroy*, 20 How. 34. The plaintiff in this case was riding on a stock pass, similar to that of Martin, discussed in the preceding case. In this case Posten is plaintiff, and the question is presented whether the liability is limited by the terms of the pass, which provides that in no case shall the liability of the company exceed \$1,000. This is an attempt to restrict the liability of the receivers of the railway company by contract, without the sanction of an order of the board of railway commissioners. In the case of *Rouse v. Harry*, 55 Kan. 589, 40 Pac. 1007, it was held that the liability of receivers operating a railroad is to be determined by the same rules as those applicable to the company. In the case of *Railway Co. v. Sherlock*, 59 Kan.—9 Am. & Eng. R. Cas. N. S., 462, 51 Pac. 899, it was held "that a stipulation in a contract for the shipment of live stock, limiting the amount for which the railroad company shall be liable in case of loss or injury, made without the permission or order of the board of railroad commissioners, is invalid and cannot be enforced." This decision was based on section 17 of chapter 69 of the General Statutes of 1897, which provides: "No railroad company shall be permitted, except as otherwise provided by regulation or order of the board, to change or limit its common-

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law liability as a common carrier." At common law common carriers are liable to persons injured through their negligence for the damages so occasioned. The provision incorporated into this stock pass is an attempt to relieve the company from the major part of this common-law liability, and falls within the prohibition of the statute. Most of the other questions discussed in the brief have been considered and disposed of in the Martin Case. The others appear of minor importance, and, while all of them have been examined, we find nothing warranting a reversal of the judgment. It is therefore affirmed. All the justices concurring.

NOTES.

Personal Injuries—Damages—Admissibility of Evidence as to Plaintiff's Position in Life, Business, etc.—In estimating damages in actions for personal injuries it is proper to consider the injured passenger's position in life, the business or profession in which he is engaged, the means at his disposal to earn money, and the extent to which they are affected in consequence of the injury.

Phillips *v.* London, etc., R. Co., 5 C. P. Div. 280, 5 Q. B. Div. 78; Mackoy *v.* Missouri Pac. R. Co., 5 McCrary (U. S.) 538; Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409; Louisville, etc., R. Co. *v.* Miller, 141, Ind. 533; Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332; Whalen *v.* St. Louis, etc., R. Co., 60 Mo. 323; Brignoli *v.* Chicago, etc., R. Co., 4 Daly (N. Y.) 182.

In an action by a passenger to recover damages for injuries resulting from a carrier's negligence, it is competent for the plaintiff to show the business in which he is engaged, the extent and amount of his ordinary business, and thus lay the foundation which will enable the jury to ascertain the direct and necessary damages which resulted from the injury. Rio Grande Western R. Co. *v.* Rubenstein, 5 Colo. App. 121; Wade *v.* Leroy, 20 How. (U. S.) 34; Ohio, etc., R. Co. *v.* Hecht, 115 Ind. 443; Wallace *v.* Western North Carolina R. Co., 104 N. Car. 442, 41 Am. & Eng. R. Cas. 212.

In an action against a carrier of passengers to recover damages for personal injuries, where the sole question is how much the earning capacity of the plaintiff has been decreased by reason of his injuries, it is competent to prove what his business was worth for the year preceding the accident and what it was after the accident. Chicago, etc., R. Co. *v.* Meech, 59 Ill. App. 69; Galveston, etc., R. Co. *v.* Cooper, 2 Tex. Civ. App. 42.

Where a professional man is injured through the negligence of a carrier he may testify as to his past earnings for the purpose of enabling the jury to fix the amount of his damages. Nash *v.* Sharpe, 19 Hun (N. Y.) 365; Walker *v.* Erie R. Co., 63 Barb. (N. Y.)

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260; *Simonin v. New York, etc., R. Co.*, 36 Hun (N. Y.) 214; *Phillips v. London, etc., R. Co.*, 5 Q. B. Div. 78.

The injuries having disabled plaintiff for some time to carry on the business in which he was engaged, he may prove, as an element of his damages, "what he was making at the time he was injured." *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 9 So. Rep. 303.

Evidence of the amount of plaintiff's earnings is admissible, not as a basis of computation, but merely as a circumstance tending to show his capacity to earn money. *Simonson v. Chicago, R. I. & P. R. Co.*, 49 Iowa 87.

In an action to recover for personal injuries, whereby the plaintiff who was an architect was incapacitated from pursuing his business, evidence of the nature and extent of his business is competent to go to the jury; not as furnishing a measure of damages, but to guide them in the exercise of that discretion as to the amount of damages which, to a certain extent, is vested in a jury in such cases. *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434; *affirming* 32 N. J. L. 166.

Carriers—Power to Limit Liability without Order of Commissioners—Kansas Statute.—In *St. Louis & P. F. Ry. Co. v. Sherlock*, (Kan.) 9 Am. & Eng. R. Cas., N. S., 462, it was held that under section 17, c. 69 Gen. St. Kan. 1897, a stipulation, in a contract for the shipment of live stock, limiting the amount for which the railroad company shall be liable in case of loss or injury, made without the permission or order of the board of railroad commissioners, is invalid, and cannot be enforced.

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v.

STATE.

(*Supreme Court of Tennessee, March 12, 1898.*)

Indictment for Permitting Negroes to Ride In Car for White Passengers—Constitutionality of Statute.*—The question whether or not a state statute requiring railroad companies to furnish separate cars or compartments for white and colored passengers, and applying not only to intra-state travel, but to inter-state travel also, is repugnant to the federal constitution is an open one under the decisions of the supreme court of the United States.

Same—Inter-State Commerce.—The act of 1891 (Chapter 52) of Tennessee containing a provision of such nature, is not a regulation of inter-state commerce.

Same—Police Power.—Such provision is not obnoxious to the Constitution of the United States, but is a reasonable exercise of the police power of the state.

*See note at end of case.

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APPEAL by defendant from Davidson county criminal court. *Affirmed.*

Smith & Maddin, for plaintiff in error.

The Attorney General, for the state.

SNODGRASS, J. The plaintiff in error was indicted and convicted under the act of 1891 (chapter 52), for unlawfully failing, neglecting, and refusing to assign certain negroes to the car and compartment of car used on the Louisville & Nashville Railroad for colored passengers, and for permitting them to ride in the car and compartment thereof assigned to white passengers. He appealed, and contests here the correctness of the judgment, upon the ground that the act referred to is invalid, as a regulation of interstate commerce, and in violation of the constitution of the United States on that subject (article 1 § 8), which vests in congress the power to regulate commerce with foreign nations and among the states and with the Indian tribes. It is insisted, and the authorities cited to the effect, that the states have no power to regulate interstate commerce, and that the transportation of passengers from points without to points within the state or outside is such commerce, and beyond the power of state regulation. It is admitted that the act, so far as it operates to regulate commerce within the state, is valid, but it is urged that it is invalid as applied to the case of these passengers taken into the car without the state to be brought within or transported through it, as was the case in this instance; and it is urged that the question is so decided by the supreme court of the United States in the case of *Hall v. DeCuir*, 95 U. S. 485. If the contention of plaintiff in error as to the effect of this decision was correct, we would hold that decision conclusive, and reverse the judgment, for we not only recognize the right of that court to determine that question, but we regard its adjudications as always correct within its province, until reversed or changed by itself, and accord to them that

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unhesitating respect which is due the supreme court of the United States as our own highest court for the settlement, and rightful settlement, of all questions which our federal constitution and laws submit to its judgment. If there be any courts of the states which question or attempt to avoid them, either as unauthorized or unjust, because not in harmony with any judicial or political theory of their own, this court is not one of them. We bow to its decisions, not only as right, but as just and proper expositions of the constitutional or legal questions it decides, treating it, not as a foreign tribunal, because national, in contradistinction to state, but as our own, and entitled to as much consideration as if it were organized to determine such questions alone for this state, and, more, because it is the supreme power which we have created for the ultimate settlement of all such controversies in all the states of our common government. But we are of the opinion that the question here involved was not decided in the case referred to, and, upon the aspect here presented, was not even considered. The question there was this: Under the constitution of Louisiana, all persons were given equal rights and privileges upon any conveyance of a public character, and the legislature of that state provided substantially that all persons should be carried together in public conveyances. A carrier engaged in interstate commerce under a regulation adopted for that purpose by itself provided separate accommodations for white and colored passengers through that state and others adjacent. A colored passenger applied for transportation from New Orleans to Hermitage, both points within the state of Louisiana, and being refused accommodations on account of her color in the cabin specially set apart for white persons, brought suit in the Eighth district court for the parish of New Orleans under the Louisiana act to recover damages for her mental and physical sufferings. She obtained a judgment for \$1,000. Defendant appealed to the supreme court of the state, and the judgment was affirmed. The case was carried to the

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supreme court of the United States under section 709 of the Revised Statutes. That court held that the law as construed by the state court (which construction was conclusive upon the supreme court of the United States) gave to all persons traveling in Louisiana upon public conveyances, though engaged in interstate commerce, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color, and dealt with it upon that aspect alone as an effort to regulate interstate commerce by the state, and not as a police measure, which it was not, and in which aspect, therefore, it was not considered. It was held to be a regulation of interstate commerce and to be void, because such power was vested alone in congress to be exercised; and, whether it had done so or not, the state could not do it by such a law. The court said in that case:

"There can be no doubt but that exclusive power has been conferred upon congress in respect to the regulation of commerce among the several states. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it, for, as has often been said, 'Legislation may, in a great variety of ways, affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the constitution.' *Sherlock v. Alling*, 93 U. S. 103; *State Tax on Railway Gross Receipts*, 15 Wall. 284. Thus, in *Munn v. Illinois*, 94 U. S. 113, it was decided that the state might regulate the charges of public warehouses, and in *Chicago, B. & Q. R. Co. v. Iowa*, *Id.* 155, of railroads situate entirely within the state, even though those engaged in commerce among the states might sometimes use the warehouses and the railroads in the prosecution of their business. So, too, it has been held that states may authorize the construction of dams and bridges across navigable streams situate entirely within their respective jurisdictions. *Wilson v. Marsh Co.*, 2 Pet. 245; *Pound v. Truck*, 95 U. S. 459; *Gilman v. Philadelphia*, 3 Wall. 713. The same is true of turnpikes and

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ferries. By such statutes the state regulates as a matter of domestic concern the instruments of commerce situated wholly within their own jurisdictions, over which they have exclusive governmental control except where employed in interstate commerce. As they can only be used in the state, their regulation for all purposes may properly be assumed by the state until congress acts in reference to their foreign or interstate relations. When congress does act, the state laws are superceded only to the extent that they affect commerce outside the state as it comes within the state. It has also been held that health and inspection laws may be passed by the states (*Gibbons v. Ogden*, 9 Wheat. 1), and that congress may permit the states to regulate pilots and pilotage, until it shall itself legislate upon the subject (*Cooley v. Board*, 12 How. 299). The line which separates the power of the states from this exclusive power of congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must, in all cases, be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved." Nothing better illustrates the last suggestion of the learned judge than his own view as enforced by citations in the particular case. The proposition suggested was the power of the state to regulate internal commerce, and upon this he indiscriminately cited cases so holding along with those which did hold a wider power to exist in the state when it belonged to that class known as the police power, which he was not considering. The Louisiana constitution and act were not dependent upon, or in the exercise of, such a power. A requirement that all persons who travel shall travel together is not in any sense a police regulation. It is easy to perceive how it might conduce to the comfort, health, or safety of persons traveling to

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be separated ; but no reason of this kind can be found, nor any other of a police nature, for requiring that all should be crowded or mixed together; and, presumably, therefore, as it did not arise, no such question was made. It certainly was not considered or decided in that case. The reference to authorities (some of which do relate to it) was only on a proposition as to the state's right to legislate upon domestic matters, but the reference included several which showed that such a right, if exercised under a valid law in respect to matters included in the police powers of the states, might be lawfully exercised, if so directed, although it seriously affected interstate commerce. No such distinction was there made, though later it was done, and with great force, by the same court. As already said, it was not presented as a police regulation. It was not such, but was a regulation, pure and simple, of interstate commerce. It was not an act passed in the exercise of a police power. It was based upon no such power, nor did it purport to be. The decision that it was, hence, not a valid law, was a matter of course.

But in the same opinion, JUDGE WAITE, to enforce the idea of the impropriety of such a state regulation, read an argument supposed to be applicable to any regulation or any law affecting the transportation of passengers, showing the great hardship and inconvenience to which interstate carriers would be subjected upon a different construction. He said : "If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce can-

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not flourish in the midst of such embarrassments." This was a very persuasive view on the mere question of confining a state's regulation of commerce to its own borders, when no necessity of health, comfort, or safety, and no proper police regulation, was involved. It is urged here, and has been so urged in all such cases since, but the argument has been distinctly rejected by the Supreme Court of the United States in several cases where the law considered was one enacted under the police power, and was, of course, a reasonable exercise of that power. The question was practically a new one when the opinion of JUDGE WAITE was delivered, and the application of the rule as to the power of the states to affect interstate commerce by legislation was in the formative state, and in much confusion, as he himself shows. Since that time it has been much considered and debated, and many opinions have been delivered, which mark far more distinctly and far more accurately "the line which separates the powers of the states from this exclusive power of congress," which at that time the learned judge observed to be so uncertainly and indistinctly marked. The cases subsequent to this in connection with it and those preceding have established three distinct propositions: First, that any legislation by a state, whether it be or not in the exercise of the police power, though it incidentally and remotely affect interstate commerce without constituting a regulation of it, may be valid; second, that in the reasonable exercise of the police power a state may impose burdens upon interstate commerce which occasion both inconvenience and hardship to the carrier, provided congress has not directly acted upon the same subject; third, that laws passed under the police power of the state for the reasonable regulation of travel and transportation are not regulations of interstate commerce in the objectionable sense, under the constitution. Specifically, they have also settled, fourth, that laws providing for the separation of the white and colored races in public conveyances, giving each equal privileges of travel and accomodation, are reasonable, and

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are valid exercises of state authority under the police powers, although they affect and impose burdens upon interstate commerce. *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138; *Hennington v. State*, 163 U. S. 299, 16 Sup. Ct. 1086; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418; *Gladson v. State*, 166 U. S. 427, 17 Sup. Ct. 627; *Louisville, N. O. & T. Ry. Co. v. State*, 133 U. S. 587, 10 Sup. Ct. 348. In the first of these cases, such a statute, not applying to interstate commerce, was upheld as a police regulation which was reasonable, and as not obnoxious to the thirteenth or fourteenth amendments to the constitution of the United States. JUDGE HARLAN dissented with the ability and vigor for which that distinguished judge is noted, and with the vehemence and want of strict accuracy, pardonable because general, if not universal, in unanswered dissent, in which he supposed instances of unreasonable exercise of that power, in opposition to the argument that its reasonable exercise was justified, and was not obnoxious to the federal constitution, which proposition alone the majority opinion maintained. But the decision in the second case commented upon here—*Hennington v. State*—was delivered by JUDGE HARLAN, and in this, with great clearness and accuracy, the distinction was asserted between general legislation to regulate commerce and special reasonable legislation under the police power to provide for the health, safety, well-being, comfort, and morals of the public, and that the right of the state to exercise this power existed, and that, if such legislation did not go beyond the necessities of the case, it was valid, at least until congress interferes. He enforces this view with much strength of reasoning and citation of authority, and, indeed, reiterates a view which may go beyond this, for in the conclusion of his opinion he says: "Local laws of the character mentioned have their source in the powers which the states reserved, and never surrendered to congress, of providing for the public health, the public morals, or the public safety, and are not within the meaning of the constitution, and

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considered in their own nature regulations of interstate commerce simply because for a limited time or to a limited extent they cover the field occupied by those engaged in such commerce." It is worthy of note here that the judge is not limiting the field of state legislation to questions of health, morals, and safety. These happen merely to be those subjects of police legislation which he enumerated in the particular statement quoted, but elsewhere he had spoken of those relating to the order, the comfort, and the well-being of the public; but neither does this addition make the list complete. What was intended, and all that was intended, to be expressed was that those subjects included in the police power of the state were not surrendered to congress by the grant of any other powers not expressly including any one or more of them. The body of the opinion is devoted, though, to maintaining the proposition suggested that the power remains in the state until congress has acted. In reference to this he says: "The distinction here suggested is not new in our jurisprudence. It has been often recognized and enforced in this court. In *Gibbons v. Ogden*, 9 Wheat. 1, this court recognized the possession by each state of a general power of legislation that embraces everything within the territory not surrendered to the general government, all which can be most advantageously exercised by the states themselves. Inspection laws, although having, as the court said in that case, a remote and considerable influence on commerce, are yet within the authority of the states to enact because no direct general power over the objects of such laws was granted to congress. So, also, quarantine laws of every description, if they have real relation to the objects named in them, are to be referred to the power which the states have to make provision for the health and safety of their people." It is immaterial upon which theory it be treated as vested, whether upon that that the power never was vested in congress to so regulate interstate commerce as to destroy the power of state police regulation, or whether upon the propo-

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osition that such power vested could not destroy it until exercised, the result is the same, for it is not pretended in the case under consideration that congress, if it has the power, has yet undertaken to legislate on the particular subject, or to forbid the exercise by the state of the police power to control this question.

It was not a new suggestion that the power granted to regulate commerce was not unlimited, or was not intended to give congress such power where the regulation attempted was contrary to the proper and reasonable police regulations of the different states. As pointed out by JUDGE CLIFFORD in his concurring opinion in the case of *Hall v. De Cuir*, referring to CHANCELLOR KENT's analysis of the view of the supreme court of the United States in the case of *Gibbons v. Ogden*, there were three limitations or restrictions on the power conferred upon congress to regulate interstate commerce. They were: "(1) That the power did not extend to that commerce which is completely internal, and is carried on between the different parts of the same state, not extending to or affecting other states; (2) that it is restricted to that commerce which concerns more states than one, the completely internal commerce of the state being reserved for the state itself; (3) that the power conferred does not prohibit the states from passing inspection laws, or quarantine or health laws, or laws for regulating highways and ferries, nor does it include the power to regulate the purely internal commerce of a state, or to act directly on its system of police,"—citing 1 Kent, Comm. (12th Ed.) 437. Later, in commenting on the opinion and contrasting it with another delivered by the same judge, (CHIEF JUSTICE MARSHALL), JUDGE CLIFFORD says: "Evidently he had no occasion to refer to it, or to any of its doctrines, as he properly described the creek over which the dam was erected as a low, sluggish water of little or no importance, and treated the erection of the dam as one adopted to reclaim the adjacent marshes, and as essential to the preservation of the public health, and sustained the constitutionality of the law author-

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izing the erection upon the ground that it was within the reserved police powers of the state." But we need not pursue this subject further, for, as already stated, whether these powers remain always in the state as not

granted, or whether they remain until congressional action, is immaterial. In either event, the law we are considering is valid so far as this constitutional objection goes. It remains only to consider whether it is a proper and reasonable exercise of the police power of the state, for, as was said in *Plessy v. Ferguson*, *supra*, "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."

The caption and body of the act (Acts 1891, c. 52) are as follows:

"An act to promote the comfort of passengers on railroad trains by requiring separate accommodations for the white and colored races.

"Section 1. Be it enacted by the general assembly of the state of Tennessee that all railroads carrying passengers in the state (other than street railroads) shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger cars for each passenger train or by dividing the passenger cars by a partition so as to secure separate accommodations, provided that any person may be permitted to take a nurse in the car or compartment set aside for such persons: provided that this act shall not apply to mixed and freight trains which only carry one passenger or combination passenger and baggage car, provided always that in such cases the one passenger car so carried shall be partitioned into apartments, one apartment for the whites and one for the colored.

"Sec. 2. Be it further enacted that the conductors of such passenger trains shall have power and are hereby required to assign to the car or compartments of the car (when it is divided by a partition) used for the race to which such passengers belong, and should any pas-

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sengers refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railroad company shall be liable for any damages in any court of this state.

"Sec. 3. Be it further enacted, that all railroad companies that shall fail, refuse or neglect to comply with the requirements of section one of this act shall be deemed guilty of a misdemeanor, and, upon conviction in a court of competent jurisdiction, be fined not less than one hundred nor more than five hundred dollars, and any conductor that shall fail, neglect, or refuse to carry out the provisions of this act shall, upon conviction, be fined not less than twenty-five not more than fifty dollars for each offence.

"Sec. 4. Be it further enacted that this act take effect ninety days from its passage the public welfare requiring it."

It will be seen that the act provides for separate accommodations, but for equal accommodations. It imposes no burden on either race, and gives to each the same privileges. Even in the matter of carrying nurses of another race, it gives to the colored passenger the same right to take a white nurse into the car for colored people that it does to the white passenger to take a colored nurse into that provided for white people. It is entitled if that were material, "An act to promote the comfort of passengers." It may operate for this purpose, or to promote the safety of one or both, or to further the ends of good order. If it be true, as is sometimes said, that race prejudices exist here that make it uncomfortable or unsafe, or promotive of disorder, to mix the races in public conveyances, then both safety and good order are promoted, as well as comfort in their separation. The state is to judge of the necessity for such a regulation. Whether either or both should be uncomfortable, unsafe, or liable to the injury or annoyance of disorder by such intermixture in travel is not the ques-

Name—Police
Power.

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tion. The question is whether it, in fact, is so, or whether the state legislature reasonably deemed it so, and provided against the consequences. It is in these respects, therefore, entirely reasonable. No good reason can be perceived why such legislation is objectionable, or why it might not even be extended. If California or any of the states of the West should take a like view as to intermixture of their Chinese population with that of native or white people in public conveyances, it seems clear that for the same reasons they might enact the same laws, and, indeed, yet others, for the separation of other races who might be hostile or prejudiced towards each other.

The argument that it imposes unnecessary burdens on the carrier, to which so much weight was given in the *De Cuir Case*, is not relevant, if it be a police regulation of a reasonable and proper character. The same argument was made, and on this ground repudiated, in the cases of *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, and *Hennington v. State*, 163 U. S. 299, 16 Sup. Ct. 1086. We conclude, therefore, that the law is a reasonable police regulation, and applies both to intra and inter state travel; that it is not invalid for any reason, or obnoxious to the federal constitution; that the question is an open one under the decisions of the supreme court of the United States; and that there is no reversible error in the judgment of the court below. It is therefore affirmed.

NOTES.

Separate Coaches—Statute—Constitutionality.—A state statute requiring common carriers within the state to furnish separate but equal accommodations for the white and colored races is not in conflict with the Fourteenth Amendment. *Ex p. Plessy*, 45 La. Ann. 80. And see *Louisville, etc., R. Co. v. Mississippi*, 133 U. S. 587; *State v. Judge*, 44 La. Ann. 770.

But Such a Statute cannot Apply to Interstate Passengers, as if so applied it would constitute a regulation of interstate commerce—a matter exclusively within the power of Congress. *State v. Judge*, 44 La. Ann. 770. In *Hall v. De Cuir*, 95 U. S. 485, a state statute providing that common carriers should make no discrimination on ac-

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count of color was held invalid so far as it applied to interstate commerce. In this case, the defendant was the master and owner of a steamboat enrolled and licensed under the laws of the United States. The plaintiff, a negro woman, being refused accommodations on account of her race, in the cabin specially set apart for white persons, brought suit for damages. She based her cause of action upon a statute of *Louisiana*, which provided that the rules prescribed by common carriers should make no discrimination on account of color. The state court construed the law as applying to those engaged in interstate commerce; but the Supreme Court of the United States held the Act unconstitutional so far as it applied to foreign and interstate commerce. Said the court: "Congressional inaction left Benson [the defendant] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana, or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana. * * * We think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress and not from the states." See also *The Sue*, 22 Fed. Rep. 843.

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v.

MOORMAN.

(Court of Civil Appeals of Texas, June 22, 1898.)

Ejection of Passenger—Acting Ticket Agents—False Information as to Movements of Trains.—In an action for damages for wrongfully ejecting a passenger from a railway car, it was not error to charge that plaintiff, a would be passenger, without notice to the contrary, had the right to rely upon the authority of a certain person to act as defendant's ticket agent, it appearing from the evidence that defendant's real ticket agent knew that such person frequently performed the duties of a ticket agent at such depot, though it did not appear that defendant had such knowledge; railroad companies being chargeable with notice that duties they owe to the public are habitually, or frequently performed by certain persons, when such is the case.

Same—Right to Rely on Ticket Agent.*—A purchaser of a railroad ticket, having no knowledge himself on the subject, has a right to rely upon information as to the movements of trains over the route received from defendant's ticket agent.

Admissibility of Evidence.—Evidence as to the conduct of such person in the sale of tickets while acting in the capacity of defendant's agent at such station was admissible.

*See note at end of case.

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APPEAL by defendant from McLennan county district court. *Affirmed.*

J. W. Terry and Charles K. Lee, for appellant.
Henry & Stribling, for appellee.

FISHER, C. J. This is an action by the appellee against the railway company for the sum of \$2,500 as damages sustained on account of being removed from one of the appellant's trains. Judgment
Case Stated. was in favor of the appellee for the sum of \$300. The facts in the record consistent with the verdict are as follows: The appellee purchased a ticket at Moody, Tex., to Temple and return, from a person whom he supposed was the authorized ticket agent of appellant at Moody, Tex. It seems that prior to and at the time of the purchase of the ticket he approached at the depot at Moody Edgar Brown, and inquired of Brown whether he could buy a ticket from Moody to Temple and return on the night train. Brown informed him that if he bought a return ticket he could leave Temple on the night train, which would stop and let him off at Moody. With this understanding, he bought the ticket from Moody to Temple and return, at the time believing from the statement received from Edgar Brown that he could return on the night train from Temple, and that it would stop and let him off at Moody. He was conveyed to Temple all right, and on the return trip at night he boarded the train at Temple to return to Moody. After boarding the train, and after it had proceeded on its way some distance, he was approached by the conductor for his ticket. He presented to the conductor the return ticket which he had purchased at Moody, and the conductor informed him that the train would not stop at Moody, and then and there demanded of the appellee the payment of the additional sum of 40 cents, as fare from Moody to McGregor, which was a point on appellant's road beyond Moody. Appellee informed the conductor that he did not wish to go to McGregor, but wanted to get off at Moody, and stated to the conductor the under-

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standing and agreement under which he had purchased the ticket at Moody. The conductor, in the presence of other passengers replied, "Brown did not tell you any such thing;" that he would have to get off the train, or pay the additional fare to McGregor; and that, after passing Pendleton, a station on appellant's road, the conductor stopped the train, and the appellee was required to leave it in the nighttime, and walk a distance of five or six miles to Moody. The conductor appeared to be mad, and his tone of voice in replying to appellee was harsh. The evidence tended to show that the walk of appellee upon the railway track from the point where he was put off into Moody fatigued him, and that he was humiliated by the conduct of the conductor. The real ticket agent at Moody was not Edgar Brown, but his father; but there is much evidence in the record which warrants the conclusion that Edgar Brown often and frequently exercised the functions of ticket agent in selling tickets to passengers, and this with the knowledge and consent of the real ticket agent. At the time that the ticket in question was purchased by the appellee, he made an agreement with Edgar Brown for the purchase of the ticket, with the understanding that the night train would stop and let him off at Moody. Edgar Brown at the time had no express authority from the railway company to sell tickets, but was acting as porter at the depot; but, notwithstanding this, he did frequently assume to perform the duties of selling tickets, and his conduct often, in connection therewith, was of such a character as to impress the traveling public with his authority to exercise the functions of a ticket agent, and this within the knowledge of the real ticket agent. According to the rules of appellant's road, the night train from which the appellee was removed did not stop at Moody, but there was then in existence an advertised schedule published in a newspaper, stating that this train did stop at Moody, and there is some testimony which tends to show that the night train did sometimes stop at Moody.

The principal question in this case is whether the

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appellee had the right to rely upon the agreement entered into with Edgar Brown as to the night train letting him off at Moody. Edgar Brown, it is true, was not the agent of appellant at Moody who was expressly authorized to sell tickets and make contracts concerning the transportation of passengers ; but it is clear from the evidence that he frequently assumed to exercise the functions of a ticket agent, and this within the knowledge of the real ticket agent. The court below charged the jury, in effect, that the appellee, acting in good faith, without notice to the contrary, would have the right to rely upon the authority of Edgar Brown to perform the functions which he, as agent for the appellant, appeared to be engaged in. It is contended that the evidence did not support this theory, and that the charge was erroneous, because the appellant could only be bound by the conduct of its real ticket agent, and that it could not be bound by one pretending to act as its agent, without its knowledge and consent. There is no testimony in the record which expressly shows that the higher officials of the appellant's road had actual knowledge of the functions assumed by Edgar Brown in the sale of tickets ; but the evidence most clearly shows that the agent of the appellant put in charge of the sale of tickets at Moody had actual knowledge that Edgar Brown frequently performed the duties of a ticket agent. Third parties, in dealing with railway companies in the purchasing of tickets, have the right to assume that one frequently seen in charge of the ticket office, and engaged in the sale of tickets, has the authority to perform the duties which he is apparently exercising, and, as a precautionary measure, they would not be required, before purchasing a ticket from such a party, to telegraph to headquarters, or make other inquiries from higher railway officials, as to the extent of the authority of such supposed agent. The public have the right to assume that one exercising such functions is clothed with the necessary authority to make contracts concerning the sale of tickets ; and

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in response to the proposition that the appellant did not in fact know of the power assumed by Edgar Brown, it is sufficient to say that they did possess such knowledge through the real ticket agent, whom they had, so far as the public are concerned, invested with the authority to exercise control over the sale of tickets at Moody. Furthermore, we believe it a correct principle to announce that a railway company, by reason of its duty to the public, must know who it is that habitually or usually performs the duties it owes to the public. The traveling public have the right to look to some one as the agent of the company, who has the authority to transact the particular business in question for the company; and when it is shown that one habitually or usually exercises in behalf of the company the duties that the company owes to the public, it should be charged with knowledge of the functions performed by such supposed agent, whether it actually or not possesses such knowledge. Of course, for isolated instances of usurpation of authority by one pretending to be an agent the company ordinarily would not be held liable; but where, as shown in this case, the person frequently and often performs the functions and duties of an agent, from which the company reaps a benefit, it should not be permitted to deny the authority of such agent. Its duties to the public require such a degree of watchfulness over the conduct of its business that it must know, not only that it is properly carried on, but who conducts it. It is contended, even assuming that Edgar Brown had the authority to sell tickets, that he had no power to regulate the movements of trains, and to make any contract that would interfere with the rules of the company concerning the movements of trains, and where they should stop. It is the duty of one in purchasing a ticket to inform himself as to the movements of trains over the lines of his proposed route; but we know of no better source of information, so far as the public are concerned, than that of the ticket agent with whom the public must

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deal, and with whom the contract of transportation is made. He stands as the representative of the company, and is supposed to be able to correctly impart information to parties with whom he may contract for the right of transportation as to the movements of the trains over the route which he is expecting to travel. If the passenger knows that according to the rules of the company a certain train will not stop at a particular point, he would not be safe in relying upon information received from the ticket agent to the contrary; but where he does not actually possess such knowledge he has the right to assume that the agent whom the railway company intrusts with the power to contract concerning his right of transportation possesses accurate knowledge as to the movements of trains over his prospective route, and he can safely rely upon the information received from that source. The charge of the court, as a whole, was correct upon this subject, and there was no error in refusing the charges requested by appellant.

The testimony of the witnesses Burns and McLean, which is objected to in the sixth and seventh assignments of error, was admissible. Their testimony was concerning the conduct of Edgar Brown in the sale of tickets, and acting in the capacity of agent at Moody. After considering the questions presented in the eighth assignment of error, we conclude that there was no error in the ruling of the court there complained of. We are not prepared to say that the verdict is excessive. We find no error in the record, and therefore the judgment below is affirmed. Affirmed.

Admissibility of
Evidence.

NOTE.

Duty of Passengers to Inform Themselves as to Movements of Trains.—It is the duty of the passenger to inform himself whether the train on which he intends taking passage stops at the station for which he holds a ticket, and if he fails to take this precaution, and boards a train which does not, under regulations of the company, stop at his point of destination, the company will not be lia-

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ble for not stopping thereat, provided the passenger's mistake was not induced by the company or its agents. Ohio, etc., R. Co. v. Applewhite, 52 Ind. 540; Ohio, etc., R. Co. v. Hatton, 60 Ind. 12; Pittsburgh, etc., R. Co. v. Nuzum, 50 Ind. 141; 19 Am. Rep. 703; Platt v. Chicago, etc., R. Co., 63 Wis. 511; 21 Am. & Eng. R. Cas. 319; Chicago, etc., R. Co. v. Randolph, 53 Ill. 510; Lake Shore, etc., R. Co. v. Pierce, 47 Mich. 277, 3 Am. & Eng. R. Cas. 340; Logan v. Hannibal, etc., R. Co., 77 Mo. 663, 12 Am. & Eng. R. Cas. 140; Atchison, etc., R. Co. v. Gants, 38 Kan. 608, 34 Am. & Eng. R. Cas. 290, 5 Am. St. Rep. 780; Beauchamp v. International, etc., R. Co., 56 Tex. 239, 9 Am. & Eng. R. Cas. 307; Duling v. Philadelphia, etc., R. Co., 66 Md. 120.

The passenger may rely upon the representations of the ticket agent, unless he is subsequently afforded such additional information as no prudent or reasonable man would fail to regard. Pittsburgh, etc., R. Co. v. Nuzum, 50 Ind. 141, 19 Am. Rep. 703; Lake Shore, etc., R. Co. v. Pierce, 47 Mich. 277, 3 Am. & Eng. R. Cas. 340; Dye v. Virginia, etc., R. Co., 19 Wash. Law Rep. 369. See also Barker v. New York Cent. R. Co., 24 N. Y. 599; Page v. New York Cent. R. Co., 6 Duer (N. Y.) 523.

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v.

BEEBE.

(Supreme Court of Illinois, June 18, 1898.)

Injury to Passenger on Stock Car—Negligence—Question for Jury.—In an action for injuries to a passenger on a freight car alleged to have been caused by negligence in starting the car, where the evidence is conflicting, but there is evidence tending to support the cause of action, it is not error to refuse to take the case from the jury.

Same—Attempting to Limit Liability.*—A person traveling on a freight car, with the consent of the railroad company, in charge of cattle, is a passenger, and the railroad company cannot limit its liability for injuries to such passenger to those caused by its gross negligence.

Same—Law of Iowa.—And such is also the rule of law in the state of Iowa.

Contracts of Carriage—Lex Loci.—A contract of carriage entered into in the state of Iowa and partly to be performed therein, must, as to its validity, nature, obligation, and interpretation, be governed by the law of Iowa.

*See Louisville & N. R. Co. v. Bell, 8 Am. & Eng. R. Cas., N. S., 413, and *note*, p. 419.

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Instructions—Estoppel.—A party who has requested certain instructions in his own behalf, is estopped from complaining of similar instructions given at the request of the other side.

Remarks by Counsel.—Where defendant objected to remarks of plaintiff's counsel to the jury, and the objection was sustained, but did not request the court to rule out such remarks, he cannot complain of the lower court's failure to rule them out.

APPEAL by defendant from appellate court Third district. *Affirmed.*

This is an action on the case brought by appellee against appellant for alleged negligence in causing the death of her intestate. The jury found the issues for the plaintiff assessing her damages at \$5,000.

Case Stated.

A new trial was denied and judgment was rendered on the verdict. Upon appeal to the appellate court, this judgment has been affirmed, and the present appeal is prosecuted from such judgment of affirmance. The facts out of which the questions involved arise are substantially as follows: On April 15, 1894, the appellee's intestate, Charles I. Beebe, who lived at Webster City, Iowa, chartered a car over the appellant's railroad from Webster City, Iowa, to West Lebanon, Ind., and placed his horses (seven in number) in one end of the car and his household goods in the other end thereof, to be carried to West Lebanon, Ind., by way of Dunbar, Freeport, Lasalle, and Wenona, Ill. Between the doors of the car were two barrels of water, and hay and oats and boxes. The train, of which the car chartered by the deceased was a part, was a through freight train, which left Webster City about 7 o'clock on the morning of said 15th day of April. The train reached Freeport, Ill., some time after 11 o'clock in the night of that day. The car in question was then put into another train going south, and was the seventh car from the engine. The train leaving Freeport reached Lasalle at about a quarter past 5 o'clock on the morning of April 16th, and there stopped to change engines. At Lasalle, Beebe watered his horses with the consent of the conductor and pursuant to an arrangement with him. The horses were in the back part of the car, with their heads to the east, and separated

from the household goods by a plank nailed across the car some three feet above the floor. The horse next to the plank was a small broncho pony, which had been used for family driving. On account of the way in which the goods were loaded, the east door of the car could not be opened. The deceased was assisted in watering his stock by the conductor and the brakeman. As soon as the last bucket of water was handed up to the deceased through the door on the west side of the car, which was the only door open, the train pulled out,—Beebe being still in the car,—and did not stop again until it reached Wenona, 20 miles to the south. The train arrived at Wenona a little after 6 o'clock on the morning of April 16th. At Wenona the appellant's road crossed the road of the Chicago & Alton Railroad Company on an up grade. As the train pulled down over the crossing of the Chicago & Alton Railroad it was subjected to a severe and violent jerking and jumping; and Beebe, who had remained in his car all the way from Lasalle, fell or was thrown out of the west door. His right foot and ankle, being caught under the wheels, were crushed, and within three hours amputated by the company's local surgeon. About 7 o'clock in the evening of the next day he died. The appellant introduced in evidence a certain live-stock contract executed on April 15, 1894, between the deceased, Beebe, as shipper, and the appellant, by its agent. Certain provisions in print precede the contract, and refer to the contract as one to be executed in duplicate by the shipper and the agent of the company. The provision hereinafter quoted seems to be a part of the preface to the contract, and not of the contract itself; but, as both parties treat it as being embodied in the contract, it is here set forth as a part thereof. The provision referred to is as follows: "The owner will feed, water, and take care of his stock at his own expense and risk. Free transportation will be given to the owner or his *bona fide* employees in charge of the stock, as per current instructions given to agents. Persons so passed will be conveyed at their own risk of personal

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injury from any cause whatever, except injuries arising from gross carelessness of the company, and must ride in the caboose attached to the train conveying the stock."

Williams & Capen, for appellant.

Fifer & Barry and *A. B. Davidson*, for appellee.

MAGRUDER J. (after stating the facts.) 1. At the close of the evidence the defendant presented to the court a written instruction saying to the jury "that there is no evidence to support a verdict for the plaintiff, if rendered in this case, and you are accordingly instructed to return a verdict for the defendant." This instruction was refused, and its refusal is assigned as error. After a careful examination of the case, we are of the opinion that there was evidence tending to support the cause of action set up in the declaration, and therefore the court committed no error in refusing to take the case from the jury. The declaration alleges, in substance, that, the train having come almost to a standstill, the engineer, negligently, carelessly, suddenly, violently, and without warning, started the engine forward, and thereby, with great force and violence, jerked the car in which the deceased was a passenger, by means of which he was thrown down and out of it, and received the injuries from which he died. One of the questions of fact in the case is whether or not there was any unusual violence in the jerking or bumping of the car, beyond that which is inevitable to freight trains under the circumstances mentioned in the statement preceding this opinion. There was testimony on both sides of this question. Another question of fact was whether the death of appellee's intestate was caused by the fall from the car, or by a kick which he is alleged to have received from one of the horses in the car. There is testimony on both sides of this question. Another question of fact was whether or not the deceased was guilty of contributory negligence. Upon both sides of this question, also, there was much testimony. Upon

Injury to Passenger on Stock Car—Negligence—Question for Jury.

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all these matters of fact the jury were elaborately instructed; 13 instructions having been given for the plaintiff, and 18 for the defendant. Six of the instructions given for the defendant were first modified by the court before they were given. Six others asked by the defendant were refused. The verdict of the jury, and the judgment entered thereon in the circuit court, and the judgment of the appellate court affirming the judgment of the circuit court, are conclusive upon these questions of fact, so far as this court is concerned. It is the duty of a railroad company to have a good, substantial, and safe road track for the use of its trains; and it is also its duty to see that its trains are properly managed. When a passenger is injured from a failure to perform this duty, the railroad company is guilty of negligence, for which it may be held responsible in damages. Where a passenger is lawfully upon a freight train, and arises, when the train comes to a standstill, either for the purpose of alighting from the train, or for the purpose of feeding stock, where a contract with the company requires him to do so, and is injured by a sudden start of the train, or by an unusual jerking or bumping of the train, the jury will be justified in finding that the railroad company is guilty of negligence, if it be shown that the plaintiff was in the exercise of ordinary care for his safety at the time of the injury. *Navigation Co. v. Webster*, 25 Fla. 394, 5 South. 714; *Railroad Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204. It is claimed that the deceased was guilty of contributory negligence, upon the alleged ground that when injured he was in the car chartered by him, where his horses and household goods were, instead of being in the caboose attached to the freight train. It is true that the contract required the deceased to "ride in the caboose attached to the train conveying the stock." But the contract also states that "the owner will feed, water, and take care of his stock, at his own expense and risk." The contract must be so construed as to be consistent with itself. If the deceased was obliged to feed, water, and take care of his stock,

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he had the right to go into the car where the stock was, in order to fulfill this obligation. Counsel for appellant claim that while the train was in motion it was the duty of the deceased to be in the caboose, and that only when the train stopped did he have any right to go to his own car to feed and water his stock. The evidence tends to show that when the train stopped at Lasalle the deceased was in his own car, and was there engaged in watering his stock, and was assisted in so doing by the conductor and brakeman of the train. While he was thus engaged in feeding and watering his stock, the train suddenly started, and did not again stop until it reached the place where the accident occurred. The stop made at Lasalle would appear to have been a very short one, and not long enough to enable the deceased to finish the acts of attention which he was giving to his stock. It was a fair question to be submitted to the jury, whether under all the circumstances, the servants of the appellant in charge of the train did not fail to give the deceased sufficient time to feed and water his stock and return to the caboose before the train started. After the train started, and while it was in motion, it was not possible for him to reach the caboose. It was a question, therefore, for the jury to determine, whether or not the deceased was guilty of contributory negligence in being in the car, and whether or not he was not forced to remain there by reason of the conduct of the servants of the appellant, in causing the train to start before he had finished caring for the stock. If there had been no provision in the contract of shipment requiring the deceased to feed and water his stock, it would have been the duty of the appellant to do so, and appellant would have been liable to the deceased for a loss or injury occurring to the stock in case it had failed to discharge this duty. But inasmuch as, by the terms of the contract, the duty of caring for the stock was assumed by the deceased, as the shipper thereof, the appellant was under obligations to afford him a reasonable opportunity and reasonable

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facilities for doing what the contract required him to do. It failed to furnish him such reasonable opportunity and facilities, if it refused to detain its train long enough at a proper stopping place to enable him to feed and water his stock and return to the caboose before the starting of the train. 5 Am. & Eng. Enc. Law (2d Ed.) pp. 436, 437.

2. It is assigned as error by the appellant that the court gave certain instructions for the appellee upon the trial below. Complaint is made of the first and second of such instructions. These instructions announce, in substance, that such portion of the contract as required the intestate to be conveyed at his "own risk of personal injury, from any cause whatever, except injuries arising from gross carelessness of the railroad company," was null and void, and of no binding effect. The question presented by the objection to these instructions is whether a common carrier can by contract exempt itself from liability for negligence in the conveyance of a passenger, provided only such negligence is not gross in its character. Many of the cases make a distinction between negligence and gross negligence, and hold that a carrier may exempt itself from liability for the former, though not for the latter. Undoubtedly the great weight of authority is in favor of the position that the carrier cannot by contract exempt itself from liability for ordinary negligence. It would certainly seem to be against public policy that a common carrier, owing a duty to the public to carry its passengers safely, and to exercise the highest degree of care and skill in doing so, should be allowed to exempt itself from liability for any degree of negligence which should cause an injury to a passenger. 5 Am. & Eng. Enc. Law (2d Ed.) p. 618. It is said, however, that in Illinois a carrier may by contract limit its liability for all negligence, except gross negligence. This rule has been laid down in some cases in reference to the shipment and carriage of property, but does not apply when a carrier intends to limit its liability for personal injury to a passenger

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paying fare. Where a passenger was traveling in the cars of a railroad company upon a free pass given him by the company, and received injuries to his person, it has been held that a contract exempting it from liability for any other species or degree of negligence than gross negligence was valid. *Railroad Co. v. Read*, 37 Ill. 484; *Railway Co. v. Beggs*, 85 Ill. 80. But in the present case it cannot be said that the deceased intestate was riding upon a free pass. "A person who is traveling, with the consent of the railroad company, upon a freight train, in charge of stock or goods carried by the company for him, is a passenger. *Railroad Co. v. Beaver*, 41 Ind. 493; *Lawson v. Railway Co.*, 64 Wis. 447, 24 N. W. 618. Even where such a person is traveling in charge of cattle, on a drover's pass, he is a passenger for hire. The consideration for his passage is the service he renders in taking care of the cattle, or the charge made against him or his employer for shipping the cattle. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Horst*, 93 U. S. 291; *Railroad Co. v. Curran*, 18 Ohio St. 1; 3 Am. & Eng. Enc. Law, p. 16, and cases cited in notes; *Railroad Co. v. Brown*, 123 Ill. 162, 14 N. E. 197." *Railroad Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809. Inasmuch as the deceased was a passenger, the degree of care required of the appellant for his safety was "the highest reasonable and practicable skill, care, and diligence." *Railroad Co. v. Arnol*, 144 Ill. 271, 33 N. E. 204, and cases there cited. In the case of *Arnold v. Railroad Co.*, 83 Ill. 273, it seems to have been held that a railroad company could make a contract with a passenger on a freight train to exempt itself from liability for any other negligence than gross negligence. That case proceeded upon the theory that there was a difference between the obligation of a railroad company to carry a passenger upon a freight train, and its obligation to carry a passenger upon a passenger train, in respect to the degree of care required to be exercised. In later cases, however, it has been held that a carrier will be held to the same strict accountability for the

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negligence of its servants, resulting in injury to a passenger who is lawfully and properly on a freight train, as governs its liability for such negligence where the transportation is upon a train devoted to passenger service exclusively. *Railroad Co. v. Arnol, supra*; *Railroad Co. v. Blumenthal, supra*. A railroad company cannot exempt itself from the exercise of care and diligence in conveying its passengers, and cannot, even by contract, limit its liability for injuries to passengers to gross negligence alone. It is responsible for any degree of negligence which is sufficient to cause the injury, whether the negligence be called gross or ordinary. The requirement of such responsibility is demanded upon grounds of public policy.

Same—Attempting to limit liability.

It is contended by appellee that under the law of Iowa, where the contract was made, it was void and of no binding effect. Upon the trial of the case the plaintiff below introduced in evidence section 1308 of the Code of 1873 of Iowa, which is as follows: "Sec. 1308. No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier of passengers, which would exist, had no contract, receipt, rule or regulation, been made or entered into." The plaintiff below also introduced in evidence the opinion of the supreme court of Iowa in the case of *McDaniel v. Railway Co.*, 24 Iowa, 412, holding that a contract similar to that here under consideration was made void by said section 1308, and could not be enforced in Iowa. Whether or not the restriction of appellant's liability, as contained in this contract, was void or not by reason of said section 1308, depends upon the further question whether it is to be construed according to the law of Iowa or the law of Illinois, if the law of Illinois were such as it claimed to be by the appellant. The contract was executed in the state of Iowa. As a general rule, the law of the state in which a contract for carrying is made controls, as to its

Same—Law of Iowa.

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nature, interpretation, and effect. In *Pennsylvania Co. v. Fairchild*, 69 Ill. 260, we said (page 263): "The rule upon that subject is well settled, and has often been recognized by this court, that contracts are to be construed according to the laws of the state where made, unless it is presumed from their tenor that they were entered into with a view to the law of some other state." See, also, *Railway Co. v. Smith*, 74 Ill. 197. We discover nothing in this contract to indicate that in entering into it the parties had in view the law of any other state than that of Iowa. In *Railroad Co. v. Boyd*, 91 Ill. 268, where the goods were shipped from Massachusetts to Lincoln, Ill., and the contract of shipment was made in Massachusetts, we said (page 271): "The contract for the carriage of the goods having been made in Massachusetts, the law of that state must control, as to its nature, interpretation, and effect." It is contended by counsel for appellant that this contract should be interpreted in accordance with the law of the place where it is to be performed. This action is brought in Illinois, and the injury resulting in Beebe's death occurred in Illinois. There is nothing in the terms of the contract itself to indicate that the parties intended any performance thereof in the state of Illinois. If there was any intention that the contract should be performed in any other state than Iowa, the performance must have been contemplated as taking place in the state of Indiana, rather than in the state of Illinois, because the property carried was to be taken to Indiana. The performance of the contract was to be consummated in the latter state. If, however, the contract be regarded as one which was to be partly performed in Iowa and partly in Illinois, it yet must be said of it that it is a contract which is entire and indivisible. "If a contract be entire and indivisible, and is to be partly performed in the state where it is made, and partly in another, then the *lex loci contractus*, or the law of the state where it is made, governs as to its validity; and, if invalid there, it is invalid everywhere else." *Ror. Interstate Law*,

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p. 69; *McDaniel v. Railway Co.*, *supra*; *Western & A. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 7 S. E. 916. Inasmuch, therefore, as the contract, under the construction contended for by appellant, was partly to be performed in Iowa it must, as to its validity, nature, obligation, and interpretation, be governed by the law of Iowa. This being so, it was void, under section 1308, and the instructions complained of were not erroneous.

Contracts of Car-
riage—Lex Loc.

The objections made by the appellant to the third and eighth instructions given for the appellee are disposed of by what has already been said. As to the objections to the eleventh, twelfth, and thirteenth instructions given for the plaintiff below, it is sufficient to say that appellant asked similar instructions in its own behalf, which were given, and therefore it is estopped from complaining. *Railroad Co. v. Latimer*, 128 Ill. 163, 21 N. E. 7; *Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162.

Instructions—Es-
topped.

3. The appellant further complains that counsel for plaintiff below was guilty of making improper remarks to the jury. The counsel was severe in his comments upon the character of some of appellant's witnesses. These comments, however, were called forth and justified by the remarks previously made in his address to the jury by one of the counsel for appellant. Aside from this, however, when the remark complained of was made by the counsel for the plaintiff below in his closing address to the jury, counsel for appellant objected to the same, and the court sustained the objection. Counsel for appellant are estopped from here complaining of a ruling made by the court below which was in their favor. After the court made a remark which amounted, in substance, to a sustaining of the objection so made, counsel for the appellant did not ask the court for any further ruling upon the subject. They were content with the action of the court, so far as it went. They did not request the court to rule out the objectionable remark, and therefore it cannot now be said that there

Remarks by Coun-
sel.

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was a refusal to rule it out. In arguing cases to the jury, attorneys must be allowed to make reasonable comments upon the evidence, and upon the bearing of the witnesses giving the evidence. The interests of public justice require that counsel should not be subjected to any unreasonable restrictions in this regard. We discover nothing erroneous in the action of the court below upon this subject. The judgments of the appellate court and of the circuit court are affirmed. Judgment affirmed.

BOGGS, J., took no part in the decision of this case.

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(*Supreme Court of Tennessee, April 20, 1898.*)

Violent Ejection of Passenger—Exemplary Damages—Pleading.*—In an action against a railroad company for injuries to a passenger alleged to have been caused by the act of one of defendant's servants in rudely pushing or knocking plaintiff from the car, while it is necessary to set out in the declaration the facts constituting malice, etc., upon which the claim for exemplary damages is predicated, it is not necessary in order to recover exemplary damages that they should be claimed in so many words.

Instructions.—It was not necessary in such action that the court should define "gross negligence," "fraud," "malice," "cruel or wanton and oppressive conduct,"—terms used in the charge, any of such terms being applicable to the wrongful act as alleged.

Same.—Defendant cannot complain because the court, in charging as to defendant's liability in case plaintiff was injured as alleged, failed to state what acts would be in the scope of the servant's authority, the only defense being that plaintiff's injuries were the result of a mere accident not attributable in any way to the servant.

Same.—Where the liability, if any, is for the positive misconduct of an employee, it is not error to refuse to instruct that the burden of proof was on plaintiff to show that defective appliances were the proximate cause of the injury.

Same.—Defendant cannot complain of the refusal of a request to

*See notes at end of case.

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instruct when the ground of the request was fully covered by the general charge.

Sleeping Car Porters as Railway Employees.*—The conductor or porter of a sleeping car is a servant of the railroad company of whose train his car is at the time being a part, in all matters relating to the safety of its passengers.

Pleading and Proof.—The rule that plaintiff must always prove that he was injured in the manner set out in the declaration, merely necessitates his doing so substantially.

Admissibility of Evidence.—A party is not prejudiced by the admission of immaterial cumulative evidence.

Arguments before Jury.—Within proper bounds, the court will not interfere with the manner of presenting a case by counsel, and in such action it was not error to allow plaintiff's attorneys to illustrate by means of furniture the manner in which plaintiff may have been hurt.

Evidence and Verdict.—In such action it was for the jury to determine whether or not the plaintiff's theory as to the cause of his injury was worthy of acceptance, it having been plausible, and supported by some evidence.

Excessive Verdict.—In such action, if defendant was liable at all, it was for the improper and oppressive treatment of a passenger by one of its employees, which resulted, practically, in the loss of plaintiff's left hand; and a verdict for \$2500 was not excessive.

Stenographic Notes—Costs.—The Tennessee statute only requires stenographic notes to be transcribed where an appeal is taken, and it was error in such action to make defendant pay the cost of a transcript of such notes, made at the plaintiff's instance, when there had been a mistrial, and no appeal was possible.

APPEAL by defendant from Haywood county circuit court. *Corrected and affirmed.*

J. W. E. Moore, for appellant.

A. D. Bright and H. J. Livingston, for appellee.

WILKES, J. This is an action for damages for personal injury. It was tried before the court and jury, and a verdict and judgment were rendered for \$2,500, and the railroad company has appealed Case Stated. and assigned errors.

The facts, so far as are necessary to be stated, are: The plaintiff bought a coupon ticket from the Louisville & Nashville Railroad Company, from Memphis to Jackson, Tenn., intending to stop at Humboldt, and transfer in the night-time to the Mobile & Ohio Railroad. He had fallen asleep on the train, and about 10 o'clock, when it reached Brownsville, he awoke, and, thinking he was perhaps at Humboldt, he went to the

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door of the car, and got off on the north side, the platform being on the south side. Looking around, he found that he was mistaken as to the place. The train started on about that time, and he attempted to board the coach again, when according to his version, while on the steps or platform (and he could not be certain which), he was struck or shoved by a man wearing the uniform of a railroad employee, and his left hand was knocked loose from the railing. He swung around until his right hand was also twisted from the railing, and then fell on the ground, partly under the car; and his left hand was badly crushed, so that it was amputated, all but the thumb and little finger, and the latter was rendered perfectly stiff. He suffered great pain, and has virtually lost the use of his left hand. The plaintiff was not able to say who it was that struck or pushed him, but thought it was a negro porter, and was certain the person had on the uniform of a railroad employee. The witness was shown the crew of the train, and asked to identify the man who struck or pushed him, but was not able to do so. He was not able to give a very satisfactory or definite answer as to which end of the car he went out at or attempted to re-enter. The theory of the railroad company is that, in attempting to board the train, he fell off, and was not struck or pushed; and evidence is introduced to show the whereabouts of all the train hands or crew, so as to demonstrate that it was impossible for any of them to be present at the time he says he was pushed off.

Eight errors are assigned by the defendant company. The first is to the effect that the court charged the jury that if the injury was done by the defendant, and was the result of gross negligence, fraud, or malice of the defendant, or was inflicted cruelly, wantonly, and oppressively, they might give punitive or exemplary damages in addition to compensatory damages. This is said to be error because the declaration made no claim in terms for exemplary damages. When special damages are claimed arising out of a special or peculiar state of facts, they must be averred before they can be proven.

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Burson v. Cox, 6 Baxt. 360, 363; Ferguson v. Moore, 98 Tenn. 343, 350, 39 S. W. 341; Fry v. McCord, 95 Tenn. 678, 33 S. W. 568. There is, however, a difference between special damages and exemplary or punitive damages. Special damages are the natural, but not necessary, result of the injury complained of; and hence they must be specially alleged in order that the defendant may have notice thereof, and be prepared to meet the same upon the trial. Exemplary or punitive damages are given as a punishment for fraud, malice, gross negligence, or oppression. They are not based upon the nature and extent of the injury so much as they are upon the oppression of the party who does the injury; and the basis is not so much compensation for any special injury as it is a punishment for the *mala fides* of the party doing the injury, and is visited upon him on grounds of public policy. While it is necessary to set out in the declaration the facts constituting fraud, malice, oppression, etc., upon which the claim for exemplary damages is predicated, it is not necessary that it be claimed, in so many words, that some or all of the damages are exemplary or punitive. Burson v. Cox, 6 Baxt. 360; 5 Enc. Pl. & Prac. 723; Railroad Co. v. Holland (Ga.) 10 S. E. 200; Express Co. v. Brown (Miss.) 7 South. 318; 8 South. 425; Railroad Co. v. Arnold (Ala.) 4 South. 359.

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It is also said that the court erred in not defining "gross negligence," "fraud," "malice," "cruel or wanton and oppressive conduct,"—terms used in the charge. We are of opinion that it was not necessary to give a definition of each or any of these terms as applicable to the facts of this case. If the plaintiff was rudely pushed or knocked off the train, the conduct would readily fall under either head. In addition, there was no request for such definition or the application of the terms to the facts of the case.

Instructions.

It is said that the court erred in charging that if plaintiff was pushed from the train by any of the agents

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or employees of the train, acting in the scope of their employment or authority, the railroad company would be liable, and if done in a grossly negligent or oppressive manner, the railroad company would be liable for punitive damages. It is said the error consists in not stating what acts would be in the scope of the employee's authority or liability. And in this connection it is said a railroad company is not liable for the willful and malicious acts of a servant not authorized or approved and ratified by the master, but perpetrated to gratify the private malice of the servant under mere color of discharging a duty to the master. Unquestionably, the latter proposition is correct law as an abstract proposition, and when applied to trespassers or third persons not passengers; but there was no evidence tending to show in this case any private act of malice, or that the act was done by the wantonness of an individual. On the contrary the defense was that no injury was done in any way, and that it was a mere accident due to plaintiff's carelessness. The plaintiff was a passenger, and the rule is that a passenger is not only entitled to civil treatment at the hands of all employees, but to their protection; and the railroad company will be held liable for any act of rudeness and oppression resulting in injury to a passenger at the hands of any of its employees while on the train, the safety and proper treatment of the passengers being within the scope of employment and range of duties of every employee. *White v. Railway Co.* (N. C.) 20 S. E. 191; *Railway v. Jefferson* (Ga.) 16 S. E. 69; *Railroad Co. v. Flexman*, 42 Am. Rep. 33; *Transportation Co. v. Smith*, 16 Lea, 498, 1 S. W. 280; *Eichengreen v. Railroad*, 96 Tenn. 229, 34 S. W. 219; *Packet Co. v. White* (Tenn. Sup.) 41 S. W. 583. In addition, it may be added that there was no request for additional instructions, or for the explanation of terms.

The defendant railroad company made four special requests, which were refused,—the first, in regard to the burden of proof; second, to the effect that proof of injury would not raise any presumption of negli-

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gence; third, that the crew of the sleeping car were not to be treated as a part of the crew of the train, and the railroad company would not be liable for their acts, especially in vindictive damages; and, fourth, that plaintiff must prove that he was injured in the manner set out in his declaration, if at all.

To be more specific, the first request, in substance, was that, in case of an injury to a passenger, it was incumbent to prove that the proximate cause of the injury was the want of something which, Same. as a general rule, the carrier was bound to supply, or the presence of something which as a general rule, the carrier was bound to keep out of the way. It is evident that this request is a mere abstraction, and has no applicability to the facts in this case. Here the liability, if any, is for the positive misconduct of an employee, and not any defect in appliances, machinery, or equipment.

The ground of the second request was fully covered by instructions in the general charge, to the effect that the plaintiff must, in order to recover, prove that he was pushed or knocked off the train by one Same. of the crew, and the jury must also find that it was done by one of the train crew acting in the scope of his employment. As just seen, this instruction was more favorable to the railroad company than the law warranted when the person injured or maltreated is a passenger.

The third request was that the jury be instructed that the conductor and porter of the sleeping car are not a part of the train crew of a railroad passenger train, and in this connection it is said the plaintiff could not recover if the wrong was done by either of these employees. The relevancy of this request arises out of the fact that, while all of the train crew except these employees testified that they did not push the plaintiff off the train, the sleeping-car conductor and porter were not examined. The request is not the law. It has been held in a number of cases that the conductor or porter of a sleeper is a servant of the rail-

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road company of whose train his car is at the time being a part, in all matters relating to the safety of its passengers. *Williams v. Car Co.* (La.) 4 South. 85; *Thorpe v. Railway Co.*, 32 Am. Rep. 325; *Railway Co. v. Athol* (Ind. App.) 33 N. E. 469; *Railroad v. Dies*, 91 Tenn. 180, 18 S. W. 266; *Railroad Co. v. Katzenberger*, 16 Lea, 380, 1 S. W. 44.

Sleeping-car Porters as Railway Employees.

As to the fourth request, so far as it is good law, and applicable to the case, it was embraced in the general charge. The plaintiff must always prove that he was injured in the manner set out in the declaration; but this does not mean that he must make out his proof in the minutest detail to correspond with the statement in his declaration. The court charged the jury that the plaintiff must prove his case as alleged in his declaration, and this was, in substance, several times repeated, and made specific by adding that they must find that he was pushed or knocked off the train by some agent or employee of the company, acting within the scope of his authority.

Pleading and Proof.

It is said it was error to allow Covington, the night watchman at Brownsville, to state, over objection, the point where the night train usually stopped. The witness was not present on the night of the injury, but stated that the train at night usually stopped at a certain place, but could not state where it stopped that night. There was other proof to show where it did actually stop, and this does not appear to have been a matter of any serious importance. We are of opinion the evidence was not material, and also that it was not incompetent as a circumstance cumulative to other evidence so far as it had any bearing on the real issues involved.

Admissibility of Evidence.

It is said the court erred in allowing the plaintiff's attorneys to illustrate the manner in which the plaintiff may have been hurt. This was done in the course of the argument, and by means of a desk in the court room, a part of its furniture. It seems that counsel for the plaintiff had used two chairs in illustrating their theory of the case, both

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in examining the witnesses and in the course of the argument; and counsel of railroad commented on it, and the use of the desk was an additional illustration by the plaintiff in his closing argument. The court, over the protest of the defendant company, allowed the plaintiff to use the desk. This was a matter which addressed itself to the discretion of the trial judge, and also to the credulity and sound sense of the jury. Within proper bounds, the court will not interfere with the manner of presenting a case by counsel. *Ferguson v. Moore*, 98 Tenn. 350, 39 S. W. 341. And we are unable to see that any injury could result from such illustrations. As to whether they were plausible or not was for the jury to decide.

It is said, finally, that there is no evidence to support the verdict. From what has already been stated, it will be seen that the whole controversy must turn upon the question whether the plaintiff was pushed or knocked off the train by an employee of the railroad or whether he fell off in his efforts to get back on the train, after getting off himself. It is the testimony of all the trainmen, except the conductor and porter of the sleeping car, who did not testify, that they did not do it; and they gave evidence to show that they were not at the place or in such position as to have done the act. On the contrary, it is positively stated by the plaintiff that he was pushed off by one of the train crew in uniform. Much stress is laid upon the indefiniteness of the plaintiff's statement as to where he was when he was pushed off—that is, whether on the steps or platform of the car,—and the fact that he could not identify any one of the crew as the person who did the act, although they were all shown to him. But we think the jury perhaps considered the facts that it was night, and more or less dark; that the plaintiff had been suddenly aroused from sleep; that he had become confused as to his whereabouts, thinking he was at Humboldt, when in fact he was at Brownsville; that he attempted hurriedly to re-enter the car when he ascertained his mistake; that he could not have been

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expecting to be put off or pushed down; and that the whole matter occurred in a very short time; and that he may have been mistaken for a tramp, entering the train on the wrong side. The jury, in this view of the case, may very well have considered his statements sufficiently definite, under all these circumstances.

It appears that the inside of the plaintiff's right hand was bruised, as if it had been done by firmly grasping something which turned in his hand; and it is said this tends to support his statement that he clung to the railing with that hand, but this might have happened on either theory. It is shown that several of the crew got off and back on the train at different places when the train was at Brownsville. One of the crew (Foreman) states that he was on the platform, talking to the operator and ticket agent, when the train was waiting; and when the train started, he says, he got on it on the front end of the rear car, which was the Nashville coach. His testimony, to some extent, is contradicted by Martin. The whole matter was submitted to the jury, and they have seen proper to believe the theory of the plaintiff, and it is plausible, and has some evidence to support it.

It is said the verdict is excessive. We do not so regard it, looking at it in the light the jury must have regarded it in order to give any verdict whatever. If the railroad was liable at all, it was for the improper and oppressive treatment of the plaintiff as a passenger; and, viewed from that standpoint, the verdict is not excessive, and the judgment is affirmed, with costs.

A stenographer was sworn under Act 1887, c. 217 (Shannon's Code §§ 4695-4697), to take down the testimony in the case, at the instance and request of defendant. The statute provides that in such cases the stenographer shall be sworn to make a true, impartial, and complete stenographic report of all the oral testimony given in the case; and, in case of appeal, a transcript of the stenographic notes shall be made part of the bill of exceptions

Stenographic Notes
—Costs.

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subject to correction by the presiding judge, and the party alone at whose instance the stenographer was employed shall be responsible for his compensation for the work done by him. On the second trial, which resulted in a mistrial, a stenographer was sworn; and after mistrial was had, on motion of counsel for plaintiff, and over defendant's objection, the court required him to transcribe his notes and file the same, and taxed the cost to the railroad. It is now objected that the statute does not require the notes of the stenographer to be transcribed, except where appeal is taken, and that it was error to require it to be done in this case at plaintiff's instance, and make the defendant pay the costs. We are of opinion the court in this case should not have charged the cost of transcribing the stenographic notes into writing to the railroad company. There being a mistrial, and no appeal being possible, no transcript was necessary for purposes of appeal. It could only have been useful to either party in preserving the testimony in view of a future trial. If either party desired, for this or other purpose, to have it transcribed, he should have been required to pay the cost of this transcribing, the other stenographer's cost being paid by the party by whom he was requested to do the work. We are of opinion the trial judge was in error in this matter of the cost of transcribing the notes, and this error will be corrected; and in all other respects the judgment of the court below is affirmed, with costs.

NOTES.

Exemplary Damages—Pleading.—In an action for a tort, it is not necessary that exemplary damages shall be claimed *eo nomine* in the declaration. It is enough that the facts alleged and proved be such as to warrant the assessment. *Savannah, F. & W. R. Co. v. Holland*, 41 Am. & Eng. R. Cas. 196, 82 Ga. 257, 10 S. E. Rep. 200.

To entitle the plaintiff to exemplary or punitive damages they must be claimed in the complaint. *Alabama G. S. R. Co. v. Arnold*, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 4 So. Rep. 359, 5 Am. St. Rep. 354.

A tort that sounds in exemplary damages is where some right of person or property is invaded maliciously, violently, wantonly, or

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with reckless disregard of social or civil obligations; and to recover such damages, plaintiff must allege the elements of such a tort, and to such allegations the testimony must be restricted. *Samuels v. Richmond & D. R. Co.*, 52 Am. & Eng. R. Cas. 315, 35 So. Car. 493, 14 S. E. Rep. 943; *Sullivan v. Oregon R. & N. Co.*, 21 Am. & Eng. R. Cas. 391, 12 Oreg. 392, 7 Pac. Rep. 508.

To entitle a party to a recovery for either the actual damages awarded by statute or exemplary damages given by the constitution he must both allege such facts as entitle him to such damages and sustain such allegations by competent evidence. *Houston & T. C. R. Co. v. Baker*, 11 Am. & Eng. R. Cas. 667, 57 Tex. 419.

Where actual and exemplary damages are claimed, the better practice is that they should be claimed by proper allegations, in the nature of distinct counts, on different causes of action. The court should instruct the jury according to the facts and as to the law governing them as to the measure of damages; and the jury should, in the verdict, ascertain what is actual and what exemplary. *Galveston H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189.

When exemplary damages are claimed, the petition should set forth the acts or omissions which constituted such fraud, malice, gross negligence, or oppression. When the defendant is a corporation it should be alleged and proved that the acts of the corporation servant, which constitute the fraud, malice, gross negligence, or oppression were committed by direction of the employer, or that the corporation through its proper agents ratified and adopted such acts as its own. *International & G. N. R. Co. v. Garcia*, 70 Tex. 207, 7 S. W. Rep. 802.

Sleeping Car Employees as Railway Employees.—The porter and other employees of a sleeping car are, in the performance of the duties and obligations of the railroad company under its contract to carry a passenger, servants of the railroad company. *Dwinelle v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 384, 120 N. Y. 117, 24 N. E. Rep. 319, 30 N. Y. S. R. 578, 8 L. R. A. 224; *reversing* 45 Hun 139, 9 N. Y. S. R. 838; *Pennsylvania Co. v. Roy*, 1 Am. & Eng. R. Cas. 225, 102 U. S. 451; *Williams v. Pullman Palace Car Co.*, 33 Am. & Eng. R. Cas. 414, 40 La. Ann. 417, 4 So. Rep. 85; *Thorpe v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 402, 32 Am. Rep. 325; *affirming* 13 Hun 70.

A passenger, by train of a railroad company, traveling in the coach of a sleeping-car company, may properly assume, in the absence of notice to the contrary, that the whole train is under one management, and in such case, where he sustains injury by the negligence of one in the employ of the sleeping-car company, he may maintain an action against the railroad company. What the effect of such notice would be is not determined. *Cleveland, C., C. & I. R. Co. v. Walrath*, 8 Am. & Eng. R. Cas. 371, 38 Ohio St. 461, 43 Am. Rep. 433.

The obligation of the company in such a case, being independent of any contractual relations, is governed by the general principles of the law of master and servant common to all systems of law, and formulated in Louisiana Civil Code as extending to all "damages occasioned by their servants in the exercise of the functions in which they are employed." *Williams v. Pullman Palace Car Co.*, 33 Am. & Eng. R. Cas. 407, 40 La. Ann. 87, 3 So. Rep. 631.

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JONES

v.

NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York, June 7, 1898.)

Carriers of Passengers—Injuries to Passenger Boarding Train not at Platform—Findings—Error.*—In an action for injuries to a passenger resulting from a jolt while she was boarding the train, which was at a point some distance from the station platform, it appeared from the evidence that plaintiff had not been directed or invited to board at such point, but had been seen to do so by one of defendant's employees; that another passenger had on another occasion boarded at such point; that another person had on a previous occasion been directed by one of defendant's employees to board at such point; and that one of such employees had seen persons board the train at such point. *Held*, that a finding from such evidence an implied invitation to plaintiff from defendant to take the train at such point, and that therefore, it was the duty of defendant to have prevented the jolting of the cars, was erroneous.

APPEAL by defendant from supreme court, general term. *Reversed*.

Hamilton Harris, for appellant.

Elbridge L. Adams, for respondent.

PARKER, C. J. The judgment awards to the plaintiff \$5,000 for injuries sustained by her in a fall occasioned by the sudden jolt of defendant's car while she was entering it. The story of the accident was told by the plaintiff, and from it we extract the following: "On the 9th of February, last year [1894], I left my home in Fairport, intending to make a visit. I left my house about half past eight in the morning, intending to take the West Shore local train for Pittsford. That train was due to leave Fairport a little after nine o'clock, or about nine o'clock. I went to the station of the West Shore. I think that is also the depot of the New York

*See notes at end of case.

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Central at Fairport. It is the only station there. It is east of main street, on the north side of the track. There are three or four tracks south of it. When I got to the station I went into the ladies' waiting room. I went up to the ticket agent at the ticket office, and asked him how long before that train was due. I spoke of the West Shore local train. He said it was due about eleven o'clock. The ladies' waiting room is on the west side of the station, and the baggage room is at the right, or still west of that. As I came out the door, I saw Mr. Johnson, the baggage master of the railroad. He wears a uniform, I know him, and had seen him there before. I asked him if that train was the west Shore local for Pittsford, and he said it was. He wanted to know if I wanted to take the train. I told him I did. He then signaled in this way, as I supposed, I don't know who, I suppose to the engineer. He simply raised his hand, and said, 'Take on this lady.' Then, after I started, I said, 'I guess I will go right on, and get on while the train is still, before the engine gets on,' and I started to go east. Mr. Johnson went off the steps before I did. He walked along out near the platform to the east, and I walked right on the platform until I came near the east end of it and then I went off, and went in the path. We were nearly along together. Then he crossed over when he got to the end of the platform. I continued east to take the train on the northeast side east of the track down as far as the caboose, way down to the end of the train. It was down to very near the first crossing. I couldn't tell you how far it is. The crossing is a drive. I don't believe I know how far that is. When I got down opposite the caboose I crossed over to take the car. I crossed two tracks. I don't know whether I crossed any more or not. When I got to the caboose I went up the steps, the same as I always go into a car. I took the outside railing of the car as I went up. * * * And as I went to put my left hand onto the knob of the door to go in, I was * * *; the next I knew after that. The next I knew after that I was thrown right backward, sudden jolt,

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and I found myself right on my back with my head * * *; something hit my head right there."

A recovery was had at the circuit, and sustained at the general term upon the ground that the plaintiff's injuries were due to the fault of the defendant. The particular wrong of which the defendant was held to be guilty is that in switching certain cars for the purpose of coupling them it brought them so sharply together as to jolt the other cars on the train, including the one passenger car which this plaintiff was at the time entering. If the passenger car had been alongside of the station platform, where people are invited by railroad companies to enter their cars, there could be no doubt that the judgment would be well grounded. When a passenger car is drawn up to the platform of a railroad station, the act of itself constitutes an invitation to enter it, extended to those desiring to become passengers therein, and the invitation necessarily carries with it an assurance that the passenger may safely enter without fear that there will be any sudden jerk or jolt of the car. But, as has already been observed in reading the testimony of the plaintiff, she did not enter the car at the station. It was standing some 525 feet from the station at the time she climbed on board of it. The train was what was known as a mixed freight and passenger. It consisted of one passenger car on the rear and such number of freight cars as the local business from time to time demanded. On this particular day, when the train came into Fairport station, and passed on beyond the depot for the purpose of doing the necessary switching, it consisted of the ordinary passenger coach and 14 freight cars. Seven of the cars were taken out of the train at Fairport and left there, and a car which was on one of the side tracks was attached to the train, so that when it left that station for Pittsford the train had six cars less than it had upon its arrival. This necessary switching was being done at the time the plaintiff attempted to board the train, to do which she had left the platform, and passed down the track several hundred feet. "When [as

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she testified] I got down opposite the caboose, I crossed over to take the car. I crossed two tracks. I don't know whether I crossed any more or not." There were neither steps nor platform of any kind at this point upon which the plaintiff could stand while trying to reach the steps of the car, nor was there present a conductor, brakeman, or other person connected with the defendant to invite or assist her to enter the car. The car itself was empty. The plaintiff knew that the engine was detached from the train, and would have to be put on again before the train could move. This fact appears from the testimony which we have quoted, where the witness says that she said to another person, "I guess I will go right on, and get on while the train is still, before the engine gets on." To the situation thus briefly, but with sufficient accuracy, presented, we must apply such legal principles as it demands. And the first inquiry is, did the defendant owe to the traveling public the duty of preventing this car from being jolted at the place where it was when the plaintiff boarded it? No special duty was owed to this plaintiff, for she was not personally invited to get on the car at this point by any of the defendant's officers or employees. It does not appear that the engineer, or any person in control of the train, knew that she was attempting to get on, and these facts justify the assertion made that the defendant owed no special duty to the plaintiff.

The further inquiry, then, is whether the defendant was under any obligation to the traveling public, of which the plaintiff forms a part, to prevent any jolting of the car at this point while making up the train. It is obvious that the answer to that question will be furnished by the evidence which discloses whether or not, by long and open user on the part of the public, with the knowledge and acquiescence of the representatives of the defendant, an invitation had been extended to the general public to board the car at this place; for certainly it will not be contended that in making up a freight train with an empty passenger car attached the

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engineer may not shunt the cars together with sufficient force to jolt every other car in the train. That this is so was well recognized by the learned justice who presided at the trial, who with clearness pointed out to the jury the right of the defendant to make up its train in its own way at any other point than one where passengers were invited to board it, and he left it to the jury to say whether, under the evidence presented, the custom was established on the part of the defendant of taking passengers on this freight train at this point. The jury found that such a custom was established, and, if there is evidence to support the finding, the judgment must stand, unless some other error shall call for reversal. It seems to us that there is no evidence to support such a finding. There was at Fairport a regular passenger station to which this train always came after being made up, when there were any passengers to be taken. On this day, as usual, and after the accident had happened to the plaintiff, it pulled up to the depot and two passengers got on. Three witnesses in all gave testimony upon which the plaintiff relied to prove her claim that the custom had been established of receiving passengers for this particular train at the place of the accident. One of the witnesses, Jacob Morrell, testified: "I live at Fairport. I know the train known as the West Shore local that leaves Fairport in the morning about nine o'clock, going west to Pittsford. I took it the 3d day of July, 1893. My wife and children were with me. I was going to Pittsford. I took the train just below the station. I should think five or six rods below. I went down, and got into the caboose at the end of the train. Q. Who told you to? A. I don't remember as any one. * * * I didn't ask anybody where I was to take that train. The train was standing there, and I got on. * * * The conductor was in the car. I don't remember seeing the brakeman." This isolated instance does not even tend to prove custom. No one connected with the defendant as an officer or employee invited him to get on the train at that

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point. It is not altogether certain that the conductor saw him get on, but, assuming that he did, what could the conductor do about it? He was without authority to put this passenger and his family off the train, or do any other act calculated to serve as punishment to them for failure to obey the well-understood rule of steam-railroad corporations that passengers shall board their trains at stations, and not elsewhere. The plaintiff's son testified that he had been to Pittsford by the West Shore train. "Q. Where did you take the train? A. Down; it was a little way beyond that little house there. East of the depot. Q. The first time you went, did you have anything to say to Johnson, the baggageman, or he to you, about taking the train? A. No, sir; only he told me to go down there, and get on. Down to the caboose. It was east of the depot, a little ways beyond that house there. I don't know what that house is. Some railroad house on the north side of the track. I did go down there, and get on. The conductor or the brakeman was down on the steps there to the platform. He helped me on. I don't remember whether he had a uniform on. He looked like a railroad man." Here we have one instance where it is pretended an employee of the defendant invited a passenger to board the train at some other point than the depot platform, and it furnishes the only evidence we have in this record of either invitation or consent on the part of the employees to the boarding of a train by passengers at any other point than the station. The third witness, John D. Maloney, formerly a flagman of the defendant, testified that the train was a freight train with a passenger coach at the end of it, with some shifting generally to do at Fairport, where the train usually remained 10 or 15 minutes. "I have seen passengers take that train below the station and at the station. I have seen them take it perhaps two hundred yards below the station. They would go down and get into the caboose while the engine was off shifting. Times when passengers would be at the station when, I suppose, the engineer

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would be notified, and he would stop there. Days I have seen four or five people go down east and take this train, and days less. I suppose the conductor's orders are, before the train goes out, to go into the station, and inquire whether there is anybody to get on the train,—whether any person has bought tickets. I think that has been done. If there are passengers to get on, the train stops at the station; if there are no passengers to get on, it goes on." Not a word in the testimony of this witness tends to show that any one of the persons whom he saw boarding this car below the station did so at the invitation of any of the defendant's officers or employees. He testified that there were days when he had seen four or five people go down and take the train at this point, but he did not say how often it occurred. Probably it was not very often, for it is made quite clear by the testimony that there were days when there were no passengers whatever at this station. In all of this record, then, we have the testimony of one witness that he was told by the baggage-man to go down east and get on the train while the engine was switching. Not another act on the part of a railroad employee of any grade tending to encourage the public, or any portion of it, in boarding the train at this point. Nothing to show that any employee of the defendant, save the flagman, Maloney, ever saw passengers boarding the train except at the station, or that such employee consented to their boarding the train elsewhere. It is not at all likely that the defendant or its employees would encourage such conduct as would require the maintenance of two stations within about 500 feet of each other for the boarding of a single car, which many days was without passengers from the village of Fairport. We have, it is true, evidence that some people boarded the train at this point, but they boarded it apparently without direction, authority, or consent; and this trespass upon the well-understood regulations of all railroad companies that passengers shall board trains at railway stations only cannot sup-

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port a finding that the defendant had invited the public to get on the train at this point as well as at the station. The safety of the traveling public has made it necessary to apply to common carriers, especially in respect to vehicles propelled by steam, far more stringent rules than govern many other relations that exist among men; but neither the public interest nor good morals would be subserved by permitting evidence of a few trespasses to establish a right in the public, and to impose a duty upon the railroad to be watchful lest future trespassers should come to harm. Reaching the conclusion that there was no negligence on the part of the defendant in this case, we omit a discussion of the other questions presented by the appellant. The judgment should be reversed, and a new trial granted, with costs to abide the event.

BARTLETT, J., (dissenting). I am unable to vote for the reversal of this judgment. The questions of plaintiff's contributory negligence and defendant's negligence were involved in a conflict of evidence, and properly submitted to the jury. It was for the jury to determine whether, by reason of the usual course of business, there was an implied assent on the part of defendant that passengers might board the freight caboose a considerable distance east of the passenger station platform. This being established, it was for the jury to further decide whether due care was observed by defendant in coupling cars at the time plaintiff sought to board the train. While this is a close case, there were three witnesses besides the plaintiff who gave evidence tending to establish a general course of business and assent, either express or implied, on the part of defendant, that passengers might enter the train at or about the point where the plaintiff did at the time of the accident. I am of the opinion that the judgment should be affirmed.

GRAY, HAIGHT, and MARTIN, JJ., concur with PARKER, C. J., for reversal. O'BRIEN and VANN, JJ., concur with BARTLETT, J., for affirmance.

NOTES

Boarding Train Elsewhere than at Place Provided—Negligence.—Where a railroad company has provided a depot and other conveniences for getting on its trains, in the absence of other proof passengers have no right to get on at other places, and an attempt to do so will be such negligence as will preclude them from recovering for injuries received thereby. *Central R., etc., Co. v. Perry*, 58 Ga. 461; *Keating v. New York Cent., etc., R. Co.*, 49 N. Y. 673. See also *Philips v. Northern R. Co.*, 62 Hun (N. Y.) 233; *Haase v. Oregon R., etc., Co.*, 19 Oregon 354, 44 Am. & Eng. R. Cas. 360.

Same—Not Negligence Per Se.—But it cannot be declared as a matter of law, that the attempt to enter a train from a place other than the platform or other place provided for that purpose is an act necessarily contributing to an injury received while thus taking passage. *Stoner v. Pennsylvania Co.*, 98 Ind. 384, 49 Am. Rep. 764; *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124, 96 Am. Dec. 114. Thus, where a passenger was injured in attempting to board a night train with sleeping car attached, it was held not to be error to refuse to instruct the jury that the plaintiff's attempting to get aboard before the sleeping car was abreast of the platform was negligence *per se*, it not appearing that the plaintiff knew the length of the train as compared with the platform, or ought to have assumed that it was intended to bring the sleeping car to that position. *Curtis v. Detroit, etc., R. Co.*, 27 Wis. 158.

Same—Effect of Custom.—Where a company has been in the habit of receiving passengers at another place, without objection, it is not negligence *per se* for a passenger to get on at that place while the train is standing still, and there is no apparent danger in so doing, but the question is one for the jury. *Keating v. New York Cent., etc., R. Co.*, 49 N. Y. 673.

Same—Effect of Known Rule.—It has been held that the carrier may make a reasonable regulation as to the place of entering its cars, and this, when known to the passenger, whether it has been written or published, or if posted up or not, he is bound to conform to, and he cannot violate it and hold the carrier liable for damages thus occasioned, even though the jury might believe that an ordinarily prudent person would have adopted the same course. *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124, 96 Am. Dec. 114. Where, however, the rule of a railroad company required passengers of a combined freight and passenger train to get on wherever it was convenient to stop, it was held not to be negligence for a passenger to board the train while it was standing forty or fifty feet from the station platform. *Louisville, etc., R. Co. v. Long*, 94 Ky. 410.

Watson v. Portland & G. E. Ry. Co

WATSON

v.

PORTLAND & G. E. RY. CO.

(Supreme Judicial Court of Maine, June 13, 1898.)

Street Railways—Riding on Platform—Contributory Negligence.*
—It cannot be said, as a matter of law, that a person who sustains injury while riding upon the platform of an electric street car is, merely from that fact, guilty of contributory negligence which will prevent his recovery in an action against the carrier.

Same.—But a passenger who rides on the platform of a car necessarily takes upon himself the duty of looking out for and protecting himself against the usual and obvious perils attendant upon his position; such as, for instance, the danger of being thrown from the platform by the jolting or swaying of the car.

Same—Question for Jury.—It is considered by the court that the evidence in this case does not so clearly show contributory negligence upon the part of the plaintiff as to authorize the withdrawal of this question from the determination of the jury; and that the case comes within the general rule that the question of negligence is ordinarily one for the jury, and not within the exception that when the facts are undisputed, and are susceptible of but one conclusion, it is the duty of the court to take the case from the jury.

EXCEPTIONS by plaintiff from Cumberland county supreme judicial court. *Exceptions sustained.*

This was a suit for injuries sustained by the plaintiff, who was thrown from the platform of the defendant's car at Knightville, June 16, 1896, by reason of the car on which he was riding being carelessly run, as he alleged, upon an open switch leading from the main line to the car barn at a rapid rate, the angle of the switch being 50 degrees. The jury returned a verdict for the plaintiff, being ordered to do so by the court.

The following instructions were requested by plaintiff.

*As to injuries to Person Riding on Platform of Street Car, see *East Omaha St. R. Co. v. Godola*, 7 Am. & Eng. R. Cas., N. S., 300, and exhaustive *note*, p. 305.

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"(1) Standing on the front platform of a car, even if there is standing room inside, is not of itself conclusive evidence that a person injured by the negligence of the persons managing the car was not in the exercise of due care.

"(2) That calling for and receiving fare from persons standing on the front and rear platforms of a car authorizes the jury to find that those so riding had been invited by those having charge of the car to ride in that place, and that implied assurance had been given by them that that was a suitable and safe place for them to ride.

"(3) That where negligence on the part of the plaintiff is connected with the cause of injury, the question to be determined is whether the defendant, by the exercise of ordinary care and skill, might have avoided the injury. If he could have done so, the negligence of the plaintiff cannot be set up as an answer to the action.

"(4) That if the running of the car upon the switch was the direct cause of the accident, and the running onto the switch could have been prevented by proper care and due diligence on the part of defendant's agents, if the other evidence in the case warrants it, the jury would be authorized to find for the plaintiff."

Charge to the Jury.

"This action, like the action which was first tried before you this term, is based on the alleged negligence of the servants of the defendant railroad company. I have had occasion to instruct you heretofore that, to entitle the plaintiff in an action like this to recover, the burden is upon him to prove not only the negligence of the railroad company, or of its servants, but that he himself was in the exercise of due care; or, in other words, that his own want of due care did not contribute to produce the injury.

"The question of contributory negligence, as it is called, is ordinarily a question of fact for the jury upon the evidence in the case; but there are a few cases where the evidence is of such a character that there is

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really no dispute about the facts, and it becomes a question of law for the court as to whether or not the plaintiff was in the exercise of due care.

"It is settled law in this state that the riding upon the platform of a passenger car upon a railroad is such negligence on the part of the passenger as will bar his recovery for injuries sustained by being thrown from the platform in rounding a curve.

"It is settled as a legal question that one who rides upon the platform of a car, and is injured by being thrown from it as the car rounds a curve, is guilty of contributory negligence.

"Now, giving the evidence in this case the most favorable view possible for the plaintiff,—even taking his own statement of how the accident occurred,—you perceive that there is no possibility, such being the law, of your rightfully returning a verdict for the plaintiff. You could not do it without violating a rule of law, because, taking the most favorable view possible of the evidence in the case, there is no dispute about the fact that at the time of the plaintiff's injury he was voluntarily riding upon the platform of the car. The car was crowded, undoubtedly; but there was standing room inside, according to the weight of the evidence. I do not understand that there is any dispute about it. And if he voluntarily took his position upon the platform, and was injured by being thrown off while the car was swinging around a curve, the fact that he was on the platform bars his right of recovery. There are so many accidents of this kind, caused by people persistently riding on the platform of cars, a place of known danger, that the law is now settled that, if they choose to ride there, they must ride at their own risk. Accidents might occur wherein the fact that a passenger was riding on the platform of a car would be no defense. For instance, if a rotten bridge should break down and all on board the car should go down into the river below, the fact that a man was on the platform would not have anything to do with the accident; the rotten bridge would be the sole cause. But if a pass-

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enger is riding there, and is thrown off as the car rounds a curve, in such cases his being there is a bar to his recovery.

"Such being the law, I am requested by the learned counsel for the defendant to instruct you, taking the most favorable view of the evidence for the plaintiff, he is not entitled to a verdict in his favor, and I so instruct you. Therefore, Mr. Foreman, you will have nothing to do but to sign a verdict *pro forma* for the defendant of not guilty."

To the refusals to give the requested instructions the plaintiff was allowed exceptions. He also took exceptions to the order of the court to return a verdict for the defendant and the following portions of the charge:

"That the question of contributory negligence, as it is called, is ordinarily a question of fact for the jury upon the evidence in the case. That there was really no dispute about the facts, and it became a question of law for the court as to whether or not the plaintiff was in the exercise of due care."

"That the riding upon the platform of a passenger car upon the railroad is such negligence upon the part of the passenger as would bar his recovery for injury sustained by being thrown from the platform in rounding a curve."

"That it is settled as a question of law that one who rides upon the platform of a car and is injured by being thrown from it as the car rounds a curve, is guilty of contributory negligence."

"That, giving the evidence in this case the most favorable view possible for the plaintiff,—even taking his own statement of how the accident occurred,—you perceive that there is no possibility, such being the law, of the jury rightfully returning a verdict for the plaintiff. They could not do it without violating a rule of law, because, taking the most favorable view possible of the evidence in the case, there is no dispute about the fact that at the time the plaintiff was injured he was voluntarily riding upon the platform of a car, and

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there was standing room inside, according to the weight of evidence."

"That the fact that plaintiff was on the platform bars his right of recovery. That if plaintiff voluntarily chose to ride on the platform he must ride at his own risk."

"That, taking the most favorable view of the evidence for the plaintiff, he is not entitled to a verdict in his favor."

"You will have nothing to do but sign a verdict *pro forma* for the defendant of not guilty."

H. & W. J. Knowlton and L. M. Webb, for plaintiff.
Clarence Hale, for defendant.

WISWELL, J. The plaintiff, while riding upon the front platform of one of the defendant's electric street cars, was thrown from the car by its sudden jolting, and, striking the ground with considerable violence, sustained more or less injury.

It is claimed that this was caused by the negligence of the motorman in allowing his car to come towards a switch with such speed that he was unable to see whether it was properly set or not, and, the switch being open, that the car was propelled so rapidly onto a siding as to cause violent jarring and jolting.

After the evidence upon both sides had been closed, the presiding justice directed a verdict for the defendant; to which direction exception is taken. It becomes necessary, therefore, to decide whether, upon all the evidence, regarding it in the most favorable aspect for the plaintiff that it is susceptible of, the jury would have been justified in returning a verdict for the plaintiff.

Upon the question of the alleged negligence of the defendant, it is only necessary to say that in our opinion there was sufficient evidence to submit this question to the jury. Was there also sufficient evidence upon the question of the plaintiff's own care to sustain the burden of proof resting upon him in that respect?

The question of negligence is ordinarily one for the

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jury,—it is always so, not only when the facts are in dispute, but also when the facts are undisputed; but intelligent and fair-minded men may reasonably differ as to the conclusions and inferences to be drawn from such facts,—because, in passing upon this question, a jury must not only decide what was in fact done or left undone, but also as to what should have been done in the situation. But this is not true when the facts are not in dispute, and when the undisputed facts are susceptible of but one conclusion. In such cases it is not only proper but it is the duty of the court to take the case from the jury. *Romeo v. Railroad Co.*, 87 Me. 540, 33 Atl. 24.

In this case the presiding justice, in directing a verdict for the defendant, gave certain reasons why, in his opinion, a verdict for the plaintiff would not be warranted, and could not be sustained, saying, among other things, “that the riding upon the platform of a passenger car upon the railroad is such negligence upon the part of the passenger as would bar his recovery for injury sustained by being thrown from the platform in rounding a curve.” And, again, “It is settled as a question of law that one who rides upon the platform of a car and is injured by being thrown from it as the car rounds a curve is guilty of contributory negligence.”

Street Railways—
Riding on Plat-
form—Contribu-
tory Negligence.

In our opinion, this was not a correct statement of law when applied to a street-railroad car, whether propelled by horses, electricity, or otherwise. Riding upon the platforms of such cars is too much encouraged by transportation companies, and too much indulged in by the public, for the court to say, as a matter of law, that the mere riding upon the platform of such a car is conclusive evidence of negligence, or is negligence *per se*, or is negligence in law. It depends upon too many other circumstances and conditions for a court to lay down any hard and fast rule in regard to it: but it is a fact which should ordinarily be submitted to the jury, in connection with all of the other circumstances of the case.

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That this is true with respect to horse street cars is not questioned, and has been frequently decided. *Meesel v. Railroad Co.*, 8 Allen, 234; *Maguire v. Railroad Co.*, 115 Mass. 239; *Fleck v. Railway Co.*, 134 Mass. 480; *Railway Co. v. Walling*, 97 Pa. St. 55; *Vail v. Railroad Co.*, 147 N. Y. 377, 42 N. E. 4; *Nolan v. Railroad Co.*, 87 N. Y. 63; *Railway Co. v. Lee*, 50 N. J. Law, 435, 14 Atl. 883.

But it is claimed upon the part of the defense that, while this is true in the case of a horse car, as to electric cars the rule laid down in this state, and generally, with respect to trains of cars upon steam railroads, should apply. *Goodwin v. Railroad Co.*, 84 Me. 203, 24 Atl. 816. We do not think so. An electric street car is still a street car, and, in our opinion, the conditions, especially with respect to riding upon platforms, are more similar to those of the horse street car than those of a railroad train upon a steam railroad.

It is a notorious fact that street-railroad companies whose cars are propelled by electricity constantly accept and invite passengers to ride upon the platforms of their cars when there is no room inside, and that persons having occasion to use such cars are frequently glad for even a foothold upon the platform, step, or footboard. Neither carrier nor public have regarded the street-car platform as a known place of danger, and we are not disposed to say, as a matter of law, that a passenger who rides upon the platform of an electric street car is thereby guilty of such contributory negligence as to prevent his recovery for injuries sustained through the fault of an employee of the transportation company. We hold, rather, that it is a circumstance to be submitted to and decided by the jury.

Such is the conclusion that many of the courts of this country have arrived at. *Elliott v. Railway Co.*, 18 R. I. 707, 28 Atl. 338, and 31 Atl. 694; *Pray v. Railway Co.*, 44 Neb. 167, 62 N. W. 447; *Wilde v. Railroad Co.*, 163 Mass. 533, 40 N. E. 851; *Reber v. Trac-tion Co.*, 179 Pa. St. 339, 36 Atl. 245.

It is further urged by counsel for defendant that the

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verdict was properly ordered, even if the reasons given therefor by the presiding justice cannot be sustained; that, if the court should hold that a person cannot be said, as a matter of law, to be Same. guilty of negligence from the mere fact that he was standing upon the platform of an electric street car in motion, this plaintiff was nevertheless negligent in not taking such precautions as the obvious and usual dangers of his position required; and that it is immaterial that the reasons given by the presiding justice in ordering a verdict were erroneous, if, upon the facts, the verdict was properly ordered.

There is no question about the correctness of these propositions of law. A passenger who rides on the platform of a car necessarily takes upon himself the duty of looking out for and protecting himself against the usual and obvious perils attendant upon his position; such as, for instance, the danger of being thrown from the platform by the jolting or swaying of the car. *Elliott v. Railway Co., supra.*

But the court is of the opinion that the evidence in this case does not sustain the defendant's contention; that is, in the opinion of the court, the evidence does not so clearly show contributory negligence Same. upon the part of the plaintiff as to authorize the withdrawal of this question from the determination of the jury. The case comes within the general rule that the question of negligence is ordinarily one for the jury, and not within the exception that, when the facts are undisputed, and are susceptible of but one conclusion, it is the duty of the court to take the case from the jury.

The entry will therefore be :
Exceptions sustained.

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PIPER

v.

NEW YORK CENT. & H. R. R. Co.

(*Court of Appeals of New York, June 7, 1898.*)

Injury to Passenger—Contributory Negligence.*—A passenger on a sleeping car familiar with the arrangements of such cars, who, finding the washroom in darkness, gropes around, and, opening the door of the vestibule by mistake, falls from the car, cannot recover for resulting injuries, even though the company may have been guilty of negligence in failing to light that end of the car, and in leaving the vestibule door unbolted, his inability to see calling for the exercise of special prudence on his part.

APPEAL by defendant from supreme court, Second department general term. *Reversed.*

Hamilton Harris, for appellant.

Joseph A. Burr, for respondent.

GRAY, J. The plaintiff has sought to recover damages of the defendant for personal injuries, received by him while a passenger upon one of its trains, which were attributable, as he alleges, to neglect in management. He was a passenger upon the train from Albany to New York City in the night of January 13, 1892. He had purchased a ticket entitling him to a berth in a sleeping car, and took possession of it early in the evening, several hours before the car was attached to the train. The car was of the vestibule pattern, that being a construction, with respect to the platform, which permitted of a continuous passage from and to other similarly constructed cars without exposure to the discomforts or perils incident to a connection by open platforms. The sections for passengers were on either side of a straight aisle, which terminated, at either end, in washrooms for the use, respectively, of

*See note at end of case.

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men and women. Beyond the washroom was the vestibule, on either side of which were doors opening upon the car steps and furnishing ingress and egress to the train. On the night in question, the men's washroom was in the forward end of the car. On the one side were the washbowls, and on the other were, first, a porter's closet, and, next to it, the water-closet. The door of this latter closet was about in the center of the washroom. The plaintiff had entered the car at Albany by that end, which, like the rest of the car, received its light from a hanging lamp. He had frequently traveled on vestibule trains, and was familiar with the sleeping-car arrangements upon this and other railroads. He had occasion, after retiring for the night to his section, to go to the men's closet in this washroom, and knew about its location. He was awakened in the morning by the porter, at about 6 o'clock, when the train was at or near Mott Haven, and, while partly undressed, again started for the men's closet. He observed that there was some light from a lamp in the centre of the car, and that some came through the windows of the sections whose berths had already been made up. He testifies that, when he reached the threshold of the washroom, the part of the car where he stood was plunged into darkness, and that he believed they were in the Park avenue tunnel. There was no lamplight in the washroom, and none in the dome of the vestibule. He could distinguish such objects as the towels by the washbowls, but not one door from another. He proceeded on for a short distance, reached for the handle of the closet door, opened it, stepped, as he supposed into the closet, and immediately fell off of the car and upon the track, where, after lying awhile, he was picked up suffering from a fractured leg. He had opened the vestibule door by mistake. He charges the defendant with the responsibility for the occurrence, in that the washroom was not lighted properly, and that the vestibule door was not locked or bolted, and he alleges that more employees were needed to insure a proper observance of the rules in those respects. He

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recovered a verdict, which the general term has sustained (34 N. Y. Supp. 1072); and the defendant now appeals to this court, asserting that not only its own freedom from negligence was shown, but that the plaintiff was guilty of contributory negligence, and that, therefore, it was error to refuse to dismiss the complaint upon the evidence.

I think that the plaintiff should have been nonsuited. If we might assume that the defendant's servants were guilty of some neglect of duty which would impose a liability upon their employer for this accident (a proposition about which I entertain very considerable doubt), it is clear that the plaintiff failed to use that vigilance and prudence which it was incumbent upon him to use in the situation in which he was placed at the time. He had been a frequent traveler upon railroads, and was familiar with such sleeping-car accommodations as were furnished in the present instance. Upon this occasion, he was either so confident of his steps as to be indifferent as to where, or how far, they took him, or he was, from some cause or other, mentally preoccupied and oblivious of his surroundings, and acted mechanically, instead of intelligently. That will not do, and cannot be excused, upon such an issue. An intelligent being, as the plaintiff certainly appears to have been, when placed in that unwonted situation which results from being rapidly transported over the ground by the appliance of powerful mechanical forces, and the use of such vehicles as are adapted to the purpose, cannot omit to use his senses, and assume that there is no cause to be prudent and vigilant. He has the right to rely upon the performance by the railroad company of its duty to exercise the utmost degree of care and skill which human prudence and foresight can suggest in transporting him; but that does not relieve him from the duty of using his own senses of sight, hearing, and perception. However great the perfection attained in the operation of railroads, a train is not absolutely a safe place, nor a normal situation for a person. Railroad companies are not insurers of the

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safety of travelers. When they have done all that human skill, prudence, and foresight suggest, in the way of precautions, of a safe roadbed, of suitable passenger cars, and of such proper mechanical appliances as are required in the operation of a train, they cannot be required to do more. Such risks as arise from heedlessness on the part of the passenger cannot be foreseen, and if the railroad company is to be liable for them, then, indeed, it becomes an insurer of the safety of its passengers. This accident was not attributable to defects in any of the appliances or machinery designed for the operation of the train. It happened simply because, put in its briefest form, the plaintiff, not regarding the darkness of the moment, opened the wrong door of several, and walked out of the car, instead of into a closet. Was the company bound to foresee and to provide against such an extraordinary occurrence and such heedless conduct? Practically put, the question is this: Can a man, in the full possession of his senses, traveling upon a railroad train, and finding himself plunged into darkness, at a moment when groping about in the car, proceed with the same confidence as in the light and be regarded as a prudent man? The question seems to answer itself.

Of course, the plaintiff insists that whether he contributed to the result by his acts was a question upon the facts for the jury to decide. The argument, in effect, is that, if he had the right to assume that the rules would be observed, and, therefore, that the vestibule door was properly bolted, then he had the right to grope about in the dark without fear of consequences, and whether he acted in so doing as a prudent man is for the jury to say. I cannot find any authority for that in the cases, and I think that reason refuses its approval to such a proposition. If the fact was—and we must under this verdict so assume—that the light was out in the washroom, either from its sudden extinguishment or by inattention, and the sudden entering of the train into the tunnel left the plaintiff in darkness, he had two courses open to him. He could wait for the

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light to be renewed, or he could try to reach the closet door without any sufficient light to guide him. What he said he did was to step out, without any hesitation, to open the door that he came to, and to continue on in perfect confidence, and that, thus, he fell off of the car. There were several circumstances which should have, more or less forcibly, made a man with his wits about him notice his situation, especially one so familiar as the plaintiff was with the car arrangements. When he crossed the threshold of the wash-room, from the car aisle, he had only about $2\frac{1}{2}$ feet to go to be opposite the door knob of the men's closet. Dividing the floor of the car from that of the vestibule platform was a sill of some 9 inches in width, with a total difference in height of the floors of about 4 inches, and the former was carpeted, while the latter was covered with a rubber mat. The vestibule door was divided into two parts, each some 13 inches in width, and united by projecting hinges on the inside, which permitted the door, upon being opened, to fold upon itself. Finally, upon opening the door, there was all the change from the atmosphere of the car to the peculiar atmosphere of a tunnel, and of a foggy and rainy morning. The absence of mind, which deprived the plaintiff of his ability to notice all these remarkable differences in the situation, might well have permitted him to fumble with the latch or bolt of the vestibule door without any awakening of his senses.

I think that we must hold, as matter of law, that the plaintiff was guilty of contributory negligence, in utterly failing to use that prudence which was especially incumbent upon him under the circumstances of the situation. The darkness called upon him to use it, and had he done so, the accident could not, within any reasonable probability, have happened. A person whose power of vision is temporarily obstructed by some supervening condition should take the greatest care, and should, if it be possible, await its passing away. If he neglects to proceed cautiously, he must accept the consequences of his undue precipitation. The fol-

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lowing cases, among others, will suffice as more or less pertinent illustrations : *Lafflin v. Railway Co.*, 106 N. Y. 142, 12 N. E. 599 ; *Heaney v. Railroad Co.*, 112 N. Y. 125, 19 N. E. 422 ; *Hilsenbeck v. Guhring*, 131 N. Y. 674, 30 N. E. 580. Therefore, without discussing at all the question of whether the defendant was shown to have been guilty of some neglect, I think, upon the plaintiff's own showing that he was himself negligent, and that it was error to refuse to dismiss his complaint, and to submit the case to the determination of the jury. The judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur. Judgment reversed, etc.

NOTE.

Injury to Passenger—Contributory Negligence.—A passenger upon a vestibuled railway train, in returning through a vestibule which was not lighted, misled by a light reflected from the car windows, walked through a door leading out of the train, which had been left unfastened, and fell from the train and was injured. In going forward through the train, he had left the door of his car open to light him upon his return. *Held*, that the question of the plaintiff's contributory negligence and the question of the defendant's negligence were for the jury. *Bronson v. Oakes et al.*, 9 Am. & Eng. R. Cas., N. S., 166.

WHALEN

v.

CONSOLIDATED TRACTION CO.

(*Court of Errors and Appeals of New Jersey, June 20, 1898.*)

Injury to Passenger—Negligence—Presumptions.—When a passenger in charge of a common carrier shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by a high degree of care, the jury have the right to infer negligence attributable to the carrier, unless the carrier proves that due care was exercised.

Same—Riding on Step—Nonsuit.*—The plaintiff testified that, while a passenger standing upon the running board of a crowded

*As to riding on step of street-car, see exhaustive note, 7 Am. & Eng. R. Cas., N. S., 305.

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trolley car, he was thrown off the car by the conductor of the car stumbling against him as he passed along the board in the discharge of his duties, but that he did not know the cause of the stumble. *Held*, that on this state of the case a nonsuit was erroneous.

(Syllabus by the Court.)

ERROR by plaintiff to supreme court. *Reversed*.

George J. McEwan, and *Frank M. Hardenbrook*,
for plaintiff in error.

Vredenburg & Garretson, for defendant in error.

DIXON, J. The circumstances presented by the plaintiff's evidence on the trial of this cause are as follows: On June 21, 1896, about 9:40 o'clock p. m., the plaintiff, with his wife and four young children, boarded a trolley car of the defendant in Bayonne for the purpose of riding to Jersey City. The car was an open one, with a board running along the outside upon which the conductor walked to collect fares. When the car stopped to receive the plaintiff, it was crowded with passengers, not only within the car, but also on the running board outside. The plaintiff's wife and children secured places inside, but the plaintiff himself stood upon the board near the middle of the car, crowded in among other passengers, and holding on to an upright post of the car. When he had been in that position about 15 minutes, the conductor, who had passed by him several times collecting fares, approached him again in going from front to rear on the board, and then occurred the accident for which the plaintiff sues, and which on the trial he thus described: "He [the conductor] was passing right around me, and somehow he stumbled,—I could not say how,—but he caught hold of me to save himself. He caught me by the shoulder, and threw me off the car. He tried to catch the upright, and lost his foot, and caught hold of me." Upon this evidence a judgment of nonsuit was entered, which the plaintiff seeks to have reversed.

It is clear that, although, by taking his stand upon

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the outside running board of the car, the plaintiff assumed the risk of such dangers as were obviously incident to that position, still the company by accepting him there as a passenger, owed to him the duty arising out of that relation. *Railway Co. v. Lee*, 50 N. J. Law, 435, 14 Atl. 883; *Railroad Co. v. Ball*, 53 N. J. Law, 283, 21 Atl. 1052; *Watson v. Railroad Co.*, 55 N. J. Law, 125, 26 Atl. 136; *Graham v. Railway Co.*, 149 N. Y. 336, 43 N. E. 917. Consequently, while one of the obvious dangers of his position was that resulting from the use of the board by the conductor, it would nevertheless be competent for the plaintiff to insist that in the manner of using it the conductor had been guilty of a breach of the defendant's duty towards him.

Injury to Passenger—Negligence—Presumptions.

It is contended for the plaintiff that the company might be held responsible for not providing a car within which he might ride safely, or for not furnishing other means for the passage of the conductor in the discharge of his functions; but, even if it could be maintained that the company was under such obligations to the public, it was evident to the plaintiff, before he boarded the car, that with respect to that ride those duties could not be performed towards him, and for that ride he took the risk of their nonperformance, and absolved the company therefrom. Under the circumstances of this case, the only breach of duty chargeable against the defendant would lie in a lack of due care on the part of the conductor as he passed along the board, and therefore we must consider whether the evidence was such as should have been submitted to the jury on the question of his negligence. The ordinary rule in actions for negligence is that plaintiff must produce some affirmative proof of the want of care on the part of the defendant; and, if his evidence is as consistent with care as with negligence in the defendant, he must fail. *Cotton v. Wood*, 8. C. B. (N. S.) 568; *Hammack v. White*, 11 C. B. (N. S.) 588; *Weller v. McCormick*, 47 N. J. Law, 397, 1 Atl. 516; *Searles v. Railway Co.*, 101 N. Y. 661, 5 N. E. 66. But in actions for injuries

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suffered by passengers while in charge of common carriers the rule is somewhat different. The rule there applicable is modified by the doctrine which seems to have given rise to the almost absolute responsibility of the common carrier of goods,—the doctrine that the carrier's greater means of ascertaining and disclosing the cause of damage place upon him a greater duty of explanation. The rule supported by authority is that when a passenger shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by due care, then the jury have the right to infer negligence, unless the carrier proves that due care was exercised. Thus in *Christie v. Griggs*, 2 Camp. 79, the plaintiff, a passenger in a stage coach, proved that the axle-tree broke; and MANSFIELD, C. J., deeming such proof *prima facie* evidence of negligence, called upon the defendant to show that the damage arose from mere accident. In *Carpue v. Railway Co.*, 5 Q. B. 747, where the train had left the track, CHIEF JUSTICE DENMAN instructed the jury that, the exclusive management of the machinery and railway being in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced, which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give. In *Stokes v. Salstonstall*, 13 Pet. 181, where the plaintiff's wife had been injured by the upsetting of a stage coach in which she was a passenger, a charge to the jury that the fact that the coach was upset was *prima facie* evidence of carelessness was approved. In *Feital v. Railroad Co.*, 109 Mass. 398, it was held that on trial of an action against a street-railway corporation for injuring a passenger, proof that the injury was caused by a car's running off the track at a place where the track and the car were under the exclusive control of the defendants was sufficient to charge them with negligence, in the absence of any evidence that the accident happened without their fault. The same application of the rule

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was made in *Seybolt v. Railroad Co.*, 95 N. Y. 563. In *Railroad Co. v. MacKinney*, 124 Pa. St. 462, 17 Atl. 14, the plaintiff, while a passenger on one of the defendant's trains, was struck in the eye by some hard substance hurled from without, and the trial judge charged the rule of law applicable to the case to be that the mere happening of an injurious accident to a passenger while in the hands of a carrier will raise *prima facie* a presumption of negligence, and throw the *onus* of proving that it did not exist on the carrier. Of this charge the supreme court said, "It is an old and well-settled principle of law of very general application in cases of injury to passengers while in the course of transportation," but that it could be invoked only when there was some evidence tending to connect the carrier, or his servants, or some of the appliances of transportation, with the happening of the injury. See, also, 2 Shear. & R. Neg. (5th Ed.) 516. Under this rule we think the plaintiff's evidence presented a question for the jury. His injury was the direct result of the conductor's act in seizing him to save himself as he stumbled. The cause of his stumbling the plaintiff did not know, and could not reasonably be required to ascertain and disclose, while it probably was known to the conductor, the agent of the defendant. Bearing in mind that the care due from a common carrier and his servants towards passengers in their charge is a high degree of care (*Readhead v. Railway Co.*, L. R. 4 Q. B. 379, 393; *Caldwell v. Steamboat Co.*, 47 N. Y. 282; *Feital v. Railway Co.*, *ubi supra*; *Railway Co. v. Lee*, *ubi supra*; *Traction Co. v. Thalheimer*, 59 N. J. Law, 474, 37 Atl. 132), it is certainly not irrational to infer that the conductor, who had passed so often over the same place under apparently the same conditions without stumbling, on this occasion stumbled through a failure to exercise that high degree of care required of him. To preclude the jury from drawing such an inference, the defendant should have been called on to explain the true cause of the occurrence. The judgment of nonsuit must be reversed, and a *venire de novo* awarded.

Same—Riding on
Step—Nonsuit.

Lexington & E. Ry. Co. v. Lyons

LEXINGTON & E. RY. CO.

v.

LYONS.

(Court of Appeals of Kentucky, May 31, 1898.)

Ejection of Passenger—Admissibility of Evidence.—In an action for the wrongful ejection of a passenger from a railway car, plaintiff testified that defendant's ticket agent represented to him while purchasing a ticket that such ticket would be good until a certain date, though the contrary appeared from the ticket itself. *Held*, that evidence to show that the general passenger agent had, a few days previous to the purchase of such ticket, by circular letter directed such ticket agent to limit all tickets like the one purchased to two days from date of sale, was admissible, having some bearing upon the question whether or not the agent had made the representation alleged.

Same.—Evidence was admissible to show that another person purchased tickets on the same occasion from such ticket agent, and that the same representation was made to such purchaser.

Same.*—As between the passenger's statements and the ticket itself, the conductor may rely upon the ticket, and when the ticket shows that the passenger is not entitled to ride on the car, an expulsion of the passenger for non-payment of fare is not a tortious act unless accompanied with unreasonable and unnecessary force or insult.

Damages.*—Where such action is essentially and in form *ex contractu*, although it is alleged in the petition that the conductor wrongfully and maliciously, and to the humiliation of the passenger, ejected him from the train, recovery must be limited to compensatory damages.

Same—Instructions.—The fact that the jury were instructed that they might consider in estimating damages any humiliation or mortification to which plaintiff may have been subjected by reason of being removed from the car, did not authorize them to find exemplary damages, such wrongs being proper elements of damages recoverable in such action for failure to furnish a ticket according to contract.

Excessive Damages.—In such action a verdict for \$250 was excessive, it appearing from the evidence that the only consequences suffered by plaintiff by reason of such ejection were that he was compelled to take a short walk to Lexington, where he remained until the next day, when he paid his fare, and returned home.

APPEAL by defendant from Lee county circuit court. *Reversed.*

*See note at end of case.

Lexington & E. Ry. Co. v. Lyons

Morton & Dornall and Arthur Carey, for appellant.
H. H. Harris, Theo. B. Blakey, and Riddell & Riddell, for appellee.

LEWIS, C. J. Appellee, a boy about 14 years of age, suing by his next friend, brought this action to recover damages for being by the conductor put off of a passenger train belonging to appellant, under the following alleged circumstances: On December 25, 1894, he purchased of appellant's ticket agent, at Beattyville Junction, a round-trip ticket from that station on appellant's road to Lexington and back; the return ticket being printed, and as follows: "Issued by the Lexington and Eastern Railway: Excursion Lexington Exposition, Lexington, Ky., to Beattyville Junction. Not good after two days from sale, and in no case good after January 8, 1895. [Signed] Charles Scott, General Passenger Agent." On the back of the ticket were the words, "No stopover allowed;" also stamp of the railroad, and the words, in writing, "Dec. 25, 1894." December 31, 1894, appellee boarded appellant's train at Lexington for the purpose of returning to Beattyville Junction, but the conductor of that train when about a mile out from the depot, refused to accept from appellee the return ticket described in satisfaction of his fare, and appellee, failing to pay his fare in money, was ejected from the train, and compelled to walk back to Lexington, where he remained until the next day, when he paid his fare, and returned home.

It is alleged in the petition, but denied in the answer, that at the time appellee purchased said round-trip ticket at Beattyville Junction the ticket agent of appellant at that station represented to him that it would be good until the 8th day of January, 1895, and upon said representation appellee paid to said agent the sum of \$2.35, and received therefor said ticket. Upon the trial the court gave to the jury the following instructions: "The court instructs the jury that if they believe from the evidence that at the time plaintiff bought the ticket

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offered in evidence that defendant's agent at Beattyville Junction represented to plaintiff that said ticket would be good for passage upon defendant's train from Beattyville Junction to Lexington and return at any time between the 25th day of December, 1894, and January 8, 1895, and that plaintiff bought and paid for said ticket relying upon said representation, and that plaintiff offered and attempted to return upon defendant's train before January 8, 1895, and was ejected therefrom by defendant's agents or employees, they will find for plaintiff such damages, if any, as they believe from the evidence he has sustained by reason of said ejectment not exceeding \$5,000, and unless they so believe they will find for defendant. The measure of damages, if any, is such as will compensate the plaintiff for any loss of time, expense of a night at Lexington, the cost of transportation from Lexington to Beattyville Junction, and for any humiliation or mortification to which he may have been subjected by reason of being removed from the train; but as to this latter item of damages the jury are instructed that they should not allow him, if they believe from the evidence that before he got upon the train at Lexington to return to Beattyville Junction the extension of his ticket had been refused by an officer of the company, and that plaintiff knew at the time he entered the train that he would not be allowed to travel upon said ticket." As there was evidence, although contradicted, tending to show that the alleged representations were made by the ticket agent at Beattyville Junction, and relied on by appellee, and also that prior to the time of his expulsion from the train he neither asked for, nor did the general manager of the road refuse, an extension of his ticket, the finding of the jury upon these two issues of fact must be accepted as true. However, it is proper in this connection to notice two rulings of the court, during the trial, upon the competency of evidence, complained of by appellant: First. Whether, on the 14th day of December, 1894, the general passenger agent, by circular letter, directed the ticket agent at Beattyville Junction to limit all excursion tick-

Ejection of Passenger—Admissibility of Evidence.

ets like the one in question to two days from date of sale, which appellant avowed, if permitted by the court, it would show he did do, was not, in our opinion, an inquiry materially affecting the legal rights of the parties. But as that circular did have some bearing on the issue of fact whether Jones, the ticket agent, did as appellee testified or did not, as he himself testified, make the representation referred to, the court ought to have permitted it read to the jury. Second. We think the court did not err in per-

Same.

mitting the witness Blakey to testify that on the same occasion he purchased three similar excursion tickets, and that the ticket agent at Beattyville Junction made the same representation as to them as appellee alleged in his petition and testified was made with reference to the one he had purchased. Nor does it make any difference that the testimony of Blakey was given "in rebuttal" instead of "in chief," inasmuch as Jones, upon the interrogation of appellant, stated that he made no representation as to Blakey except that he would sell the tickets until January 8, 1895. The generally received doctrine upon the subject of passenger tickets is that they are for the most part mere memoranda, importing a contract upon the part of the carrier to carry a passenger from one point to another in the manner in which the holders of such tickets are usually carried; the real contract between the carrier and the passenger being usually made before the ticket is delivered. Accordingly, it has been held that where the ticket does not purport to be and is not the complete agreement between the carrier and the passenger, suppletory evidence is competent to show what was the real contract indicated by the ticket. Nevertheless, it is generally,

Same.

and we think, properly, held that the ticket accepted by the passenger must usually be treated as exclusive evidence of the passenger rights as between him and the conductor, leaving the passenger to his action against the carrier if he has not been given such a ticket as the contract called for; otherwise the conductor would be compelled to accept the statements of

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the passenger in preference to, and contradictory of, the ticket presented to and relied on by himself. Nevertheless in one case (*Hufford v. Railroad Co.*, 64 Mich. 631, 31 N. W. 544) it has been held—though, we think, incorrectly—to be the duty of the conductor to accept the passenger's statement until he finds out it is not true, no matter what the ticket contained in words, figures, or other marks. As between the two, the conductor may properly rely upon the ticket as it reads, and, as the passenger cannot reasonably demand more, it follows that the expulsion of the latter from the train in a case like the one before us cannot be regarded as tortious unless accompanied with unreasonable and unnecessary force or insult. Although it is alleged in the petition that the conductor wrongfully

Damages.

and maliciously, and to the humiliation of appellee, ejected him from the train, the action is essentially and in form *ex contractu*, and the recovery, if any, must be necessarily limited to compensatory damages. And we do not think the jury were in fact

Same—Instructions.

instructed, or could have fairly understood, that they were authorized to find exemplary damages; for the mortification and humiliation consequent upon the wrongful ejection of a passenger from a railroad train is a proper element of damages recoverable for breach of contract like the present. The instructions given by the lower court accord with the principles here indicated,

Excessive Damages.

and, we think, were correct, but the amount of recovery assessed by the jury in this case was excessive,—in fact many times greater than the amount of actual damages sustained by appellee, or that can be legally or justly sanctioned by any court. The verdict, therefore, for that reason, ought to have been set aside, and for the error of the lower court in not doing so the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

NOTES

Ticket as Evidence of Passenger's Rights.—See *Alabama & V. Ry. Co. v. Holmes*, 10 Am. & Eng. R. Cas., N. S., 271, and *note*, p. 272.

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It may be stated as a general rule that the ticket is the only evidence, as between the conductor and passenger, of the latter's right to transportation, and he must exhibit it when demanded; if he fails to do this, and refuses to pay fare, he may be expelled from the train.

Willetts v. Buffalo, etc., R. Co., 14 Barb. (N. Y.) 585; *Woods v. Metropolitan St. R. Co.*, 48 Mo. Abb. 125.

In *Homiston v. Long Island R. Co.* (Super. Ct.), 22 N. Y. Supp. 738, it was held that where a passenger, whose destination makes a change of trains necessary, is unable to obtain a ticket at the station, and pays his fare to the conductor, who neglects to give him a ticket, the rule that a passenger must show a ticket or pay his fare, will not authorize an expulsion from the second train, if the conductor thereof has actual knowledge of the payment of the fare to the first conductor.

And the rule is not altered by the fact that the passenger had a ticket, but lost it. *Duke v. Great Western R. Co.*, 14 U. C. Q. B. 377; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas. 347; *Crawford v. Cincinnati, etc., R. Co.*, 26 Ohio St. 580; *Jerome v. Smith*, 48 Vt. 231, 21 Am. Rep. 125.

And with greater reason is this true, if the ticket contains an express condition that it should be shown to the conductor on every passage, and if not shown when called for, the regular fare should be paid. *Downs v. New York, etc., R. Co.*, 36 Conn. 287, 4 Am. Rep. 77. Compare with the above, *Pullman Palace Car Co. v. Reed*, 75 Ill. 175, 20 Am. Rep. 232. Here a passenger in a sleeping car had lost his ticket, but produced a written certificate from the agent selling it to him, to the effect that he was entitled to a berth. The conductor removed him, and he was allowed to recover the price of his ticket, and reasonable compensation for the trouble and inconvenience suffered by being deprived of his berth in the sleeping car.

There is much conflict upon the question of the rights and duties of the conductor and passenger respectively, when an authorized agent sells the passenger a ticket different from what he asks and pays for, and one which does not entitle him to the passage desired. According to some authorities, the conductor cannot be expected to listen to the passenger's account of the transaction, and the latter should either pay his fare, or walk quietly off the train, and then resort to an action against the company for breach of contract; but should he attempt to retain his place without paying fare, and is expelled by the conductor, he can recover no damages for the expulsion. *Peabody v. Oregon R., etc., Co.*, 21 Oregon 121; *McKay v. Ohio River R. Co.*, 34 W. Va. 65; 44 Am. & Eng. R. Cas. 395; *Weaver v. Rome, etc., R. Co.*, 3 Thomp. & C. (N. Y.) 270; *Shelton v. Lake Shore, etc., R. Co.*, 29 Ohio St. 214; *Townsend v. N. Y. Cent., etc., R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419; *Beebe v. Ayres*, 28 Barb. (N. Y.) 275; *Pease v. Delaware, etc., R. Co.*, 101 N. Y. 367, 26 Am. & Eng. R. Cas. 185, 54 Am. Rep. 609; *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342, 26 Am. Rep. 531; *Terre Haute, etc., R. Co. v. Vanatta*, 21 Ill. 188, 74 Am. Dec. 96; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Hall v. Memphis, etc., R. Co.*, 15 Fed. Rep. 57, 9 Am. & Eng. R. Cas. 348; *Yorton v. Milwaukee, etc., R. Co.*, 54 Wis. 234, 6 Am. & Eng. R. Cas. 322, 41 Am. Rep. 23; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 18 Am. & Eng. R. Cas. 339, 54 Am. Rep. 238;

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Mahoney v. Detroit City R. Co., 36 Cent. L. J. 90; *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449, 1 Am. & Eng. R. Cas. 258; *Poullin v. Canadian Pac. R. Co.*, 52 Fed. Rep. 197, 32 Am. L. Reg. 153; *Chicago, etc., R. Co. v. Bannerman*, 15 Ill. App. 100; *Rose v. Wilmington, etc., R. Co.*, 106 N. Car. 168.

The opinion of the court in *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342, 26 Am. Rep. 531, explains the reason of the rule as follows: "How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically there are but two ways—one, the evidence afforded by the ticket; the other, the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law parties interested were not competent witnesses, and even under our statute the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of the contract, where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. . . . As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket and the conductor does not carry him according to its terms, or, if the company through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case." (The action was trespass on the case for damages for unlawful expulsion.)

This case is followed in *Hufford v. Grand Rapids, etc., R. Co.*, 53 Mich. 121. But upon a second trial of that case, the rule of conclusiveness of the ticket, as between conductor and passenger, was so far abandoned, that the court held, that if the passenger had bought a ticket of a duly authorized agent, believing in good faith that it was genuine, and that the agent had a right to sell it, and states such facts to the conductor, the latter is bound to accept the statement until the contrary is shown, regardless of any words, figures, or other marks upon the ticket. And where upon such passenger's refusal to pay fare, the conductor lays hands upon him to eject him, he is guilty of assault and battery, for which the company must respond in damages. *Hufford v. Grand Rapids, etc., R. Co.*, 64 Mich. 631.

Others hold that the conductor has no right to expel the passenger, and if he does so, the company is liable in damages therefor. *Murdock v. Boston, etc., R. Co.*, 137 Mass. 293, 21 Am. & Eng. R. Cas. 268; *distinguishing Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 16 Am. & Eng. R. Cas. 386, 46 Am. Rep. 481, 50 Am. Rep. 307;

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City, etc., R. Co. v. Brauss, 70 Ga. 368, 18 Am. & Eng. R. Cas. 324; Head v. Georgia Pac. R. Co., 79 Ga. 358, 11 Am. St. Rep. 434; Georgia R., etc., Co. v. Dougherty, 86 Ga. 744, 22 Am. St. Rep. 499; Lake Erie, etc., R. Co. v. Fix, 88 Ind. 381, 11 Am. & Eng. R. Cas. 109, 45 Am. Rep. 464; Missouri Pac. R. Co. v. Martino, 2 Tex. Civ. App. 634; Gulf, etc., R. Co. v. Rather, 3 Tex. Civ. App. 72; Pennsylvania R. Co. v. Bray, 125 Ind. 229; Chicago, etc., R. Co. v. Conley (Ind. 1892), 32 N. E. Rep. 96; Carpenter v. Washington, etc., R. Co., 3 Mackey (D. C.) 225, 18 Am. & Eng. R. Cas. 370. See also Hufford v. Grand Rapids, etc., R. Co. (Mich. 1887), 31 N. W. Rep. 544.

In Philadelphia, etc., R. Co. v. Rice, 64 Md. 63, 26 Am. & Eng. R. Cas. 264, the conductor canceled the ticket by mistake, and afterwards tried to correct it, but did so in an improper way, and the passenger was expelled by a subsequent conductor. It was held that he had a right of action against the company for the expulsion.

But if a person receives from a ticket agent a ticket different from what he asks for, and keeps it four months, with full knowledge of its purport, without making complaint, he will be considered as having ratified the contract according to its terms, and waived such claims as he might have had, growing out of the mistake. Godfrey v. Ohio, etc., R. Co., 116 Ind. 30, 37 Am. & Eng. R. Cas. 8.

If the passenger's ticket is defective, and this is due solely to himself, he has no cause of action against the carrier for refusing to honor it. Thus, if the passenger engages to have his ticket stamped by the agent of the company, upon his return trip, and has ample opportunity to do so, but fails, the conductor is justified in declining to accept the unstamped ticket, and to eject the passenger if he refuses to pay fare. Boylan v. Hot Springs R. Co., 132 U. S. 146, Mosher v. St. Louis, etc., R. Co., 127 U. S. 390.

Same—Exemplary Damages.—See Louisville & N. R. Co. v. Ray (Tenn.) *ante*, p. 174, and *note*, p. 183.

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v.

SOUTH CAROLINA & G. R. Co.

(Supreme Court of South Carolina, July 7, 1898.)

Ejection of Passenger—Nonsuit—Presumption that Plaintiff was a Passenger.*—In an action for the wrongful ejection of a passenger for alleged non-payment of fare, where the presumption from plaintiff's evidence is that he was a passenger, and the ticket upon which he attempted to ride is not produced in evidence, and he testifies that he was ejected from the car by defendant's conductor after handing him such ticket, it was error to sustain a motion for a nonsuit at the close of plaintiff's testimony.

*See note at end of case.

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Same—Conductors.—The acts of the conductor within the scope of his authority being binding upon defendant, the evidence of his subsequent conduct (refunding the fare paid by plaintiff after the ejection, acceptance of such ticket, and saying the ejection was a joke) also shows error in granting the nonsuit.

Same.—Objection to such ticket merely upon the ground that it was a scalper's ticket tended to show that defendant waived all other objections thereto.

Same.—The statement of the conductor that the ejection was a joke tended to show that plaintiff was unlawfully and wantonly removed from the train.

APPEAL by plaintiff from circuit court of common pleas of Richland county. *Order of nonsuit set aside.*

*Barron & Ray and Andrew Crawford, for appellant.
Joseph W. Barnwell, for respondent.*

GARY, A. J. The appeal herein is from an order of nonsuit. The first paragraph of the complaint alleges the corporate existence of the defendant.

Case Stated.

The second paragraph alleges that the defendant is a common carrier of passengers between Charleston and Columbia. The other allegations are as follows: "(3) That on the afternoon of the 21st day of June, 1896, the plaintiff boarded the defendant's train at Charleston, S. C., for the purpose of taking passage to Columbia, having previously purchased a ticket from Charleston to Columbia, and the defendant having received its usual charge for said ticket and transportation between said places. (4) That, when the said train had gotten only a few miles from Charleston, the defendant's agent in charge of the said train demanded of the plaintiff his fare, and refused to accept their aforesaid ticket, which the plaintiff tendered to him, and which he had purchased in good faith; but the plaintiff, well knowing that his ticket was perfectly good, and that defendant had received its usual charge therefor, declined to pay any more, and persisted in riding on his said ticket. (5) That thereupon the defendant caused its train to be stopped between stations, and at a place with no shelter or convenience for passengers, and while it was then raining, and, with intent to degrade, humiliate, mortify, and wound the

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plaintiff in his person and feelings, caused him to be forcibly ejected from the said train, violently, willfully, and unlawfully, and without regard to the rights of the plaintiff, and with a design to injure and oppress him in the exercise of his lawful rights. (6) That, after the plaintiff had been so unlawfully and violently ejected from the said train, he again entered it, and, under protest, paid in money the fare demanded of him by the conductor to Branchville; that thereafter, and after proceeding some distance, the defendant's agent, who had ejected him, approached the plaintiff, refunded him the money he had paid him to Branchville, and asked for his ticket, which he had before refused, which said ticket he then punched and returned to the plaintiff, and recognized the said ticket as good and valid for passage from Charleston as far as Branchville. (7) That, after leaving Branchville, another conductor in the employment of the defendant, and who then had charge of the said train or car on which the plaintiff was traveling from Branchville to Columbia, accepted the aforesaid ticket as passage from Branchville to Columbia, it being the identical ticket that plaintiff had tendered before he was ejected from the train. (8) That by the aforesaid wrongful and unlawful acts and violence of the defendant, and disregard of the plaintiff's rights, the plaintiff has been injured in his person and feelings, to his damage five thousand dollars."

That portion of the testimony which is material to a consideration of the exceptions is so interwoven with other testimony, which, more or less, throws light upon it, that we deem it necessary to set out the testimony somewhat at length. We therefore quote from the case as follows: "Ben Iseman, sworn, says: By Mr. Barron: Q. You are the plaintiff in this case? A. Yes, sir. Q. Mr. Iseman, what was your business in the summer, in the month of June, 1896? A. Ticket broker in Columbia, S. C., and paid a license to do that business. Q. Where were you Sunday, 21st June, 1896? A. I was in Charleston, sir. Q. When did

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you leave Charleston? A. At 5:30, on the 21st. Q. On what road? A. South Carolina & Georgia road. Q. Where did you board the train? A. At Line street station, Charleston. Q. What car did you enter? A. First-class car. Q. State what occurred after that. A. The conductor came in, and hollered out, 'Tickets!' When he arrived in the car, he came up to me. I pulled out the ticket out of my pocket, and offered it to him, and he refused to accept it. I asked him on what ground. He said it was a scalper's ticket, and demanded his fare. I refused to give it to him. He walked out of the door, and came back, and he made the demand again for the fare, and I refused to give it to him again, knowing full well I had used these tickets before. (Mr. Barnwell objected.) Witness: He stopped the train, and demanded fare again. He demanded the fare, and I refused to give it to him, and he stopped his train, and said, 'Come on.' I refused to do it. I told him he would have to take hold of me; and he caught hold of me, and got out in the aisle, and said, 'Come on.' I refused to go without he took me. Got on the platform, and he pushed me off. Q. Where was that train at that time? A. A short distance from Charleston. Q. At any station? A. No, sir; I don't remember the number of miles. It was near Magnolia Cemetery. Q. What was the condition of the weather? A. Drizzling rain. Q. How many passengers were on the train? A. I can't state the number, but the cars were full. Q. The coach you were riding in was pretty full of passengers? A. Yes, sir. Q. State, now, what was the manner in which you were put off. A. He was very rough about it; seemed very determined. He was very ungentlemanly about it, in other words. * * * Q. What did you then do? A. I went back in the car, and took a seat I had vacated. The conductor came to me again, and demanded his fare. I refused to give it to him unless he would give me a receipt for it. At first he didn't agree to do it, but afterwards gave me a receipt. Mr. Barnwell: We object; we want the receipt. Mr. Barron: Q.

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What became of that receipt? A. The conductor got it back. Q. State what occurred after you had paid your fare and taken this receipt. Mr. Barnwell: My friend has not produced the ticket yet. Witness: He went through collecting his fare. He got near Branchville, which is the destination from Augusta; he ran on part of the train as far as Branchville. He came back to me, and said he would accept the ticket that he had put me off on. Mr. Barnwell: We object to any testimony about that ticket unless produced, or unless they prove it was lost. Mr. Barron: I am not trying to prove the contents of the ticket. * * * Mr. Barron: Q. State what occurred between you and the conductor in reference to this matter thereafter. A. He came back to me, and said he would accept the ticket that he had put me off on for the passage. Q. What did he do with the ticket? A. Punched it, and returned it to me. Q. What else did he do? A. He took the receipt he gave me. He put his hand in his pocket to get the money, and he said: 'I haven't got the change; will bring it in a minute.' Accepted the receipt. Went in the second car. While I was talking to Mr. Eleazor and his wife, he put the money in my pocket. Q. The amount you had paid him? A. Yes, sir. Q. You had already given up the receipt? A. Yes, sir; I staid on the car from Branchville to Columbia. The other conductor of the same line came through and accepted it for passage. Q. You surrendered it for your passage to Columbia? A. Yes, sir. * * * Q. Did he say anything to you then? A. Yes, sir; he said he didn't propose to allow me to use the South Carolina & Georgia Railroad for convenience. * * * Cross-examination: Mr. Barnwell: Q. What is the ticket usually called? A. Sullivan Island and return ticket. Q. Where did you get the ticket from? A. I bought it. Q. Who from? A. A young lady in Charleston. Q. What did Capt. Roach say about that ticket? Did he not say to you that the ticket was not transferable? A. No, sir; he did not. Q. What do you mean by a 'scalper's' ticket? He said, you say,

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that you could not ride on a 'scalper's' ticket. What is a scalper's ticket? A. More than one person uses it,—one portion of it. Q. It is a ticket purchased by one person, and used by another? A. Yes, sir. Q. Didn't Capt. Roach tell you before you got on the train that he was not going to let you ride on that ticket? A. Yes, sir. Q. He warned you that he was not going to let you ride on it? A. But he had not seen it. Q. Did you tell him what kind of ticket it was? A. I did not. Q. Why was it he said you should not ride on the train? A. He said it was a scalper's ticket. Q. In the depot in Charleston? A. No, sir; in the car. Q. In the depot in Charleston why did he say he was not going to let you ride? A. He said, damned if he proposed to let me use the South Carolina & Georgia for convenience. He did not give any explanation. He had not seen the ticket. Q. Didn't he tell you the reason that you were not going to be allowed to ride on that ticket was because you had not purchased the ticket, and it was a nontransferable ticket? A. No, sir. Q. You are positive he didn't tell you that? A. I am. Q. When you got on the train he came to take up your ticket? A. Yes, sir; he had been through the other cars. Q. Did he not tell you that you could not ride on the ticket because it was nontransferable? A. No, sir; he said it was a scalper's ticket. * * * Q. You didn't ask the conductor to carry you on the same ticket again after he first put you off? A. No, sir. Q. You had no further conversation with him? A. When he came back in the car he told me he done it as a joke. Redirect examination: Q. It was after Capt. Roach had been in that car where Capt. Gilbert was and came back that he told you it was a joke? A. Yes, sir; he had been in the second-class car. That was when we got near Branchville."

Upon the motion for a nonsuit made at the close of plaintiff's testimony the presiding judge ruled as follows: "The action is for damages for violation of plaintiff's rights. The plaintiff is bound to show, in the first instance, that he had the right which a man

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must have in order to be a passenger,—must be secured by the payment of money, or he must show some other 'voucher,' as it has been called, entitling him to be on the train; and, if there be such voucher, he must either show that the voucher was lawful, and absolutely establishing his right, or, if he is unable to produce the voucher itself, he must show that by producing the voucher or by the contents of the voucher. In brief, the plaintiff must make out by a *prima facie* case the right which he alleges has been invaded. The evidence in this case is that this plaintiff was on board of the train of the South Carolina & Georgia road, and that he had a ticket. So far as I recollect the testimony,—so far as I caught it,—there is no testimony going to show what that ticket was, except it was something to Sullivan Island,—a round-trip ticket. I do not think the testimony has made out the plaintiff's right to such an extent as that the jury could say that the right has been violated; and, that being the view which I take of the matter, I am constrained to grant the motion for a nonsuit."

The plaintiff appealed upon the following exceptions: "(1) That his honor erred in granting the nonsuit. (2) That his honor erred in holding that the plaintiff had not made out by the testimony a *prima facie* case showing his right to be carried as a passenger on defendant's train, and that said right had been violated. (3) That his honor erred in not leaving it to the jury to determine, under the testimony, whether the relation of passenger and carrier existed between plaintiff and defendant at the time of the expulsion of the former from the latter's train, and whether plaintiff's rights arising out of said relation had been violated. (4) That his honor erred in holding that plaintiff, under his proof, was not entitled to have the jury pass upon the question whether or not he was entitled to recover under the pleadings in the action against the defendant company."

The principal question in the case is whether there was any testimony whatever tending to estab-

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lish the fact that the plaintiff was a passenger at the time he was ejected from the train. It is not contended by the defendant that the plaintiff was on board a train which did not carry passengers, nor that he, after boarding the train, occupied an unusual place thereon, or, in short, that he did anything which prevented him from becoming a passenger, except the alleged refusal to pay his fare, or to present such a ticket as entitled him to the rights of a passenger. There was therefore nothing, in the first instance, to prevent the application of the rule that the presumption was in favor of the plaintiff that he was a passenger and not a trespasser. This rule is thus stated in 5 Am. & Eng. Enc. Law (2nd Ed.) 488, to wit: "Every person traveling in a railroad car, or other public conveyance, used for passenger carriage, and not connected with the railroad company or carrier, is presumed to be there lawfully as a passenger, and the burden is on the carrier to prove that he is a trespasser." The defendant contended that the ticket presented by the plaintiff was not such as entitled him to the rights of a passenger. The ticket was not introduced in evidence, and its provisions are therefore not the subject of construction by this court. As the presumption was in favor of the plaintiff that he was a passenger, and as the ticket upon which the defendant relied to destroy this presumption was not introduced in evidence, it follows, from these facts alone, that there was error in granting the nonsuit.

There are, however, other circumstances showing error in granting the nonsuit. A conductor is the representative of the company, and his acts, within the scope of his employment, are as binding upon the company as if done by the company itself.

There was testimony to the effect that, after the plaintiff was ejected from the train, the conductor refunded him the money which he had been required to pay for his fare, and accepted the ticket, which he

Ejection of Passenger—Nonsuit—Presumption that Plaintiff was a Passenger.

Name—Conductors.

Notes

punched ; also that the ticket was accepted by a second conductor, who was in charge of the train from Branchville to Columbia, and no other fare was required of the plaintiff ; also that the conductor said it was a joke when he ejected the plaintiff from the train ; also that the only objection urged against the ticket was that it was a scalper's ticket.

The acceptance, punching, and retention of the ticket by the representatives of the company furnished, at least, some evidence that it was such as entitled the plaintiff to the rights of a passenger.

Again, the objection to the ticket, on the ground that it was a scalper's ticket, tended to show Same. that the defendant waived all other grounds of objection to it.

The statement of the conductor that the ejection of the plaintiff from the train was intended merely as a joke tended to show that there was a waiver of the right to insist upon the illegality of the ticket, Same. and that the plaintiff was unlawfully and wantonly removed from the train. In the case of *Martin v. Railway Co.*, 51 S. C. 150, 28 S. E. 303, the court says: "Whether the plaintiff was a passenger or a trespasser depended upon the inference to be drawn from the testimony, under proper instructions from the court, and was peculiarly a matter for the consideration of the jury." In this case the facts were such as should have been submitted to the jury. It is therefore the judgment of this court that the order of nonsuit be set aside, and the case remanded for a new trial.

NOTES.

When Presumption that One was a Passenger Arises.—As a general rule, where it appears that plaintiff was riding in a public conveyance used for the carriage of passengers, the burden is upon the carrier to show that plaintiff was not a passenger. *Atchison, etc., R. Co. v. Headland*, 18 Colo. 477, 58 Am. & Eng. R. Cas. 4; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 57 Am. Rep. 120, 27 Am. & Eng. R. Cas. 329; *Pennsylvania R. Co. v. Brooks*, 57 Pa. St. 339; *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139, 27 Am. Rep. 693; *Gil-*

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lingham v. Ohio River R. Co., 35 W. Va. 588, 51 Am. & Eng. R. Cas. 222; Bryant v. Chicago, etc., R. Co., 53 Fed. Rep. 997, 58 Am. & Eng. R. Cas. 15.

But this presumption may be rebutted. People v. Douglass, 87 Cal. 281.

Presumption, when Does not Arise.—There is no presumption of law or fact that one found anywhere on a passenger train of a railway is a passenger. If a person is found in or on a passenger car, such a fact will justify the conclusion *prima facie* that he is a passenger. But if seen to go on the platform of a mail car or on some other car not rented for the accomodation or use of passengers, no such conclusion as that he was a passenger could be legitimately drawn. People v. Douglass, 87 Cal. 281. In this case *quoting* and *explaining* Louisville, etc., R. Co. v. Thompson, 107 Ind. 442, 57 Am. Rep. 120, 27 Am. & Eng. R. Cas. 329, the court says: "The rule, as there stated, is that 'a person on a train used for carrying passengers, is, in the absence of countervailing circumstances, presumed to be a passenger, and rightfully there.' By the language here used the presumption is allowable 'in the absence of countervailing circumstances,' which is equivalent to saying that the presumption, admitting it to exist, belongs to the class of disputable presumptions, and may be rebutted."

One on a car, as a freight car, not designed for passengers, is presumed by law not to be a passenger, and it takes special circumstances to rebut this presumption. Waterbury v. New York Cent., etc., R. Co., 21 Blatchf. (U. S.) 314, 17 Fed. Rep. 671; Atchison, etc., R. Co. v. Headland, 18 Colo. 477, 58 Am. & Eng. R. Cas. 4; Eaton v. Delaware, etc., R. Co., 57 N. Y. 382, 15 Am. Rep. 513.

When a steamboat stops at one of its usual stopping places it is not a presumption of law that every person who goes on board does so as a passenger unless he notifies an officer to the contrary so as to relieve the latter from giving to such as do not go aboard as passengers proper time and facilities for getting ashore. Keokuk Packet Co. v. Henry, 50 Ill. 264.

If a person by his own solicitation or consent is carried on a vehicle or conveyance which is not used for passenger carriage, there can be no presumption that he is a passenger, although the owner is a common carrier of passengers, by other and different means of conveyance. Snyder v. Natchez, etc., R. Co., 42 La. Ann. 302, 44 Am. & Eng. R. Cas. 278.

STATE

v.

SOUTHERN RY. CO.

(*Supreme Court of North Carolina, May 24, 1898.*)

Carriers' of Passengers—Free Passes—Discrimination.*—Under section 4 of chapter 320 of the Acts of 1891 of North Carolina a car-

*See note at end of case.

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rier of passengers is guilty of unlawful discrimination when he allows one passenger, to whom the exceptions of the statute are not applicable, to ride on a free pass and exacts the regular fare from a fellow passenger, the provision of the act that such discrimination to be unlawful must be made where the transportation of the passengers is under "substantially similar circumstances and conditions" not permitting the carrier to consider the respective rank of life of its passengers.

Same.—And it is immaterial whether the favored passenger is given a free pass, or is permitted to ride without paying fare.

Criminal Law—Intent.—Wherever an act is denounced as unlawful by statute, the doing of that act constitutes the offense, and the intent with which the act is done is immaterial.

APPEAL by defendant from Wake county superior court. *Affirmed.*

F. H. Busbee, for appellant.

W. C. Douglass and *Cook & Green*, for the State.

MONTGOMERY, J. The defendant company was indicted for an unlawful discrimination in the transportation of passengers. under section 4 of chapter 320 of the Acts of 1891,—the railroad commission act. Section 4 of that act is in the following words: "That if any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." Section 25 of the act is written as follows: "That nothing in this act shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, state or municipal governments, or for charitable purposes, or to or from fairs or exhibitions for exhibition thereat, for the free carriage of destitute and homeless persons

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transported by charitable societies and the necessary agents employed in such transportation, or the free transportation of persons traveling in the interest of orphan asylums or any department thereof, or the issuance of mileage, excursion or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangement with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad companies or company from exchanging passes or tickets with other railroad companies for their officers or employees. * * *

The bill of indictment was in form as follows: "The jurors for the state upon their oath do present that on the 1st day of July, in the year of our Lord 1897, the Southern Railway Company was a corporation operating a line of railway from Goldsboro to Charlotte, in said state, and doing the business of a common carrier in the state of North Carolina subject to the provisions of chapter 320 of the Public Laws of 1891, and that the said Southern Railway Company required and received of persons traveling over its line of railway a regular first-class passenger fare of three and one-quarter ($3\frac{1}{4}$) cents per mile for each passenger. And the jurors aforesaid do further present that the said Southern Railway Company on the day and year aforesaid, and at and in the county aforesaid, unlawfully and willfully did collect and receive from one H. L. Grant a less compensation for the transportation of said H. L. Grant from the city of Raleigh to the town of Goldsboro, in said state, than it collected, demanded, and received for the transportation of other passengers from the city of Raleigh to the said town of Goldsboro, for a like and

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contemporaneous service, in the transportation of passengers in its first-class carriages, under substantially similar circumstances and conditions. And the jurors aforesaid, on their oath aforesaid, do say that the said Southern Railway Company did then and there willfully and unlawfully and unjustly discriminate in the collection of passenger fares in favor of the aforesaid H. L. Grant, and against other persons to whom like and contemporaneous service was rendered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors aforesaid, on their oath aforesaid, do further present that on the 1st day of July, in the year of our Lord 1897, the Southern Railway Company was a corporation operating a line of railway from Goldsboro to Charlotte, in said state, and doing business of a common carrier in the state of North Carolina, subject to the provisions of chapter 320 of the Public Laws of 1891, and that said Southern Railway Company demanded and received a regular passenger fare of three and one-quarter ($3\frac{1}{4}$) cents a mile for passengers traveling in its first-class carriages over its line of railway. And the jurors aforesaid do further present that the said Southern Railway Company on the day and year aforesaid, and at and in the county aforesaid, willfully and unlawfully did make and give undue and unreasonable preference and advantage to one H. L. Grant, by then and there carrying the said H. L. Grant as a passenger free of charge over its line of railway from the city of Raleigh to the town of Goldsboro, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." The jury rendered a special verdict, in which they found the following facts: "That the defendant is a corporation carrying on the business of a common carrier in the state of North Carolina, and operates a railroad, part of which line lies between the cities of Raleigh and Goldsboro, in said state; that during the year 1897 the defendant, through its vice president, issued to one Hiram L. Grant, who was a member of the general assembly of North

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Carolina, an annual free pass, which was accepted as valid for transportation in the state of North Carolina; that on the 1st day of July, 1897, the said Hiram L. Grant was, on the presentation of this annual pass to defendant's conductor, transported free by the defendant between the cities of Raleigh and Goldsboro, in said state; that upon the train there were persons who paid for their transportation at the rate of $3\frac{1}{4}$ cents per mile for first-class passengers; that during the greater part of the year 1897 passes of substantially like character were issued to the chief executive, and to the state officers, and to members of the railroad commission, as they had been for many years previously, and were accepted and used by them in the same manner as by the said Grant; that the members of the railroad commission are charged with the duties as set forth in chapter 320 of the Acts of 1891; that the officer of defendant who issued the annual pass was advised by counsel and by members of the railroad commission that he was not violating the law of the state; there was no actual intent to violate the law upon the part of the officer of defendant issuing the pass." Judgment was pronounced on the special verdict against the defendant, and the minimum penalty was imposed.

The question presented for our decision is, does the act prohibit and make indictable the giving of free transportation to passengers by common carriers? Upon its face, clearly, it does not in all cases, because in section 25 the giving of such free transportation, or transportation at reduced rates, to certain classes of persons, therein particularly specified, is allowed; but the person who received free transportation in this case did not come within either of the exceptions of the statute. In the argument here the counsel of the defendant company contended that the defendant had not violated the provisions of the statute: First, because there was no intention on its part to violate the law; second, that the statute does not in express terms forbid the giving of free transportation to passengers, and that, if the general assembly had intended such prohibition, that

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body ought to have made known its purposes in clear and unmistakable language; third, that the giving of free transportation to a particular person, while it charged (for like and contemporaneous service) another person the prescribed rate of fare, is not an unjust discrimination, and that thereby no injustice is done to the person who pays his fare, for he has only paid what the law declares a fair price for the service rendered; fourth, that the deadhead and the paying passenger do not necessarily stand "under substantially similar circumstances and conditions," as contemplated in the statute; and, last, that the act itself has received an almost universal and practical construction in accordance with the foregoing views, by the habit of railroad companies generally giving free passes since the enactment of the law, just as they did before, to "gentlemen long eminent in the public service," higher officers of the state, members of the legislature, members of the railroad commission, etc.

The crucial point in the case is centered around the defendant's contention and assumption that the "like and contemporaneous service" in the transportation of two individuals (one carried free, and the other for the prescribed tariff rate) is not necessarily "under substantially similar circumstances and conditions"; that is, that the company can take into consideration, as to whether it will give free transportation to a passenger the circumstances and conditions which surround two persons, and if one is a "higher official" or a large shipper, or a politician of power whose influence may be of service to the company, or one of social distinction, and the other a laborer, then the conditions and circumstances are not the same, and therefore the statute does not apply. Of course, if this contention of the defendant is sound, this case is at an end, and the free transportation of passengers is therefore in no case unlawful. So we will examine that position of the defendant, first in order: What, then, in respect to the transportation of passengers in connection with the statute, is meant by the words "substantially similar circum-

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stances and conditions" ? It cannot be doubted that if each of two persons desired to ship 1000 pounds of freight, of like kind, over a railroad, between the same points, and at the same time, the company must render the same service at the same rate to both, whether one of the shippers was a politician with a "pull", or a "higher officer," or a member of the legislature or of congress, or a laborer. Beyond question, that would be a like and contemporaneous service in the transportation of a like kind of traffic, under "substantially similar circumstances and conditions." In our opinion, section 4 of the act in plain words prohibits the making of a greater charge against one person than against another for a like and contemporaneous service under substantially similar circumstances and conditions, applicable to the carriage of both passengers and property. The language is so clear "that he may read who runs." In contemplation of section 4 of the statute, the only possible difference between two individuals is that in relation to the size of their bodies; but this can have no bearing upon the matter of transportation, as the difference in size or weight of persons (over a certain age) has not yet been regarded, in the business "of hauling passengers," as ground for making difference in passenger rates. Boiled down, the contention of the defendant on this point is just this: If one person should be the governor of the state, a member of congress or of the general assembly, or a leader in what is called the business or the social world, and the other is an ordinary toiler for his bread, a case of substantially dissimilar circumstances and conditions exists, and the company may give the favored ones free transportation for their influence, and charge and receive from the other full fare, because he has no influence. Can it be supposed for a moment that the general assembly of North Carolina would enact a law—a law purporting to protect the great body of the people against inequality and unjust discrimination on the part of railroad com-

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panies—based on such class distinctions? This contention of the defendant, if it could be maintained, would simply divide the people of the state, not into the sheep and the goats, the good and the bad, and reward or punish them by giving to one and withholding from the others free passes, but into those whose influence is considered valuable to the corporation, on the one part, and the remainder of the people, on the other, and then giving to the first-named class the privilege of using the public franchise free, while it extorts from the latter the full rates allowed by law; the extortion consisting in making those least able to bear it pay the cost of transporting the well to do and influential. That position of the defendant cannot be maintained.

We will now consider the other positions of the defendant:

It was insisted that the company was ignorant of the provisions of the law in respect to the prohibition of the free transportation of passengers, and that it had no intention to commit the offense with which it is charged; and counsel dwelt especially upon that finding in the special verdict in which the jury said, "There was no actual intent to violate the law upon the part of the officer of defendant issuing the pass." Who was the officer of the company who issued the pass, and who put into the hands of the deadhead passenger the piece of paper which secured his free transportation, that his intention should be inquired into? Probably some local ^{name.}attache. What notice does the law take of his intentions or purposes in the matter before us? The thing which was denounced by the statute, and for which the defendant is indicted, is not the act of giving the free pass,—the mere handing to the passengers the piece of paper on which was written the privilege of riding free,—but the act of transporting the favored passenger without charge or the payment of fare. The law would be violated if no pass was actually issued, if the passenger was carried free. The favored passenger might be known personally to the conductor, or be made known to him by precon-

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certed signs, or mileage books distributed gratis or sold at reduced rates ; and in other ways the law might be violated. But we leave the matter of the handing over by the officer of the free pass to the passenger, and his intention in so doing, as it has no bearing in the case ; and we will take up the question of the intent of the acting, working, planning corporation, in its giving free transportation.

If there is anything well settled by the decisions of this court, it is that, wherever an act is denounced as unlawful by statute, the doing of that act constitutes the offense, and the intent with which the act is done is immaterial ; and this has been settled law for a long period of time.

Criminal Law—
Intent.

In the case of *State v. King*, 86 N. C. 603, the court said: "When an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offense ; and no one who violates the law, which he is conclusively presumed to know, can be heard to say that he had no criminal intent in doing the forbidden act." In *State v. McBrayer*, 98 N. C. 619, 2 S. E. 755 it is held that when the statute plainly forbids an act to be done, and it is done by some person, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. In *State v. Voight*, 90 N. C. 741, the court said: "The criminal intent is inseparably involved in the intent to do the act which the law pronounces criminal." To the like effect are the decisions in *State v. Kittelle*, 110 N. C. 560, 15 S. E. 103 ; *State v. Downs*, 116 N. C. 1064, 21 S. E. 689 ; *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518 ; *State v. Scoggins*, 107 N. C. 959, 12 S. E. 59 ; *State v. McLean*, 121 N. C. 589, 28 S. E. 140. It is to be observed that, in the section of the act under which this defendant was indicted neither the word "intent," nor any word synonymous with the word "intent," was used. The act simply denounced the unjust discrimination. And besides, section 25 of the act excepts from the provisions of sec-

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tion 4 certain carefully specified classes of persons, and such explicit enumeration of the excepted classes absolutely and necessarily excludes all other persons. It is true that in the bill of indictment the word "willfully" was used in connection with the discrimination, and it was insisted for the defendant that a vicious or covinous intent on its part was necessary to be proved. But that did not follow, even if such intent had been alleged in the indictment. It would have been surplusage. *State v. Edwards*, 90 N. C. 710; *State v. Keen*, 95 N. C. 637. "It is only where a statute makes the particular intent an essential element of the crime that it need be charged and proved." *State v. McCarter*, 98 N. C. 637, 4 S. E. 553. As to the plea of ignorance of the statute in reference to unjust discrimination between passengers, it is only necessary to cite some of the numerous decisions of this court on that point. In *State v. Downs*, *supra*, the court said: "Ignorance of the law excuses no one, and the vicarious ignorance of counsel has no greater value." *State v. Boyett*, 32 N. C. 336. The law does not encourage ignorance in either. *State v. Dickens*, 2 N. C. 406. If ignorance of counsel would excuse violations of the criminal law, the more ignorant counsel could manage to be, the more valuable and sought for, in many cases, would be his advice. But how is it possible to seriously consider that the defendant acted in this matter in ignorance of the law. It is not too much to say, in a judicial opinion, that the defendant is represented in its legal department by many of the best-equipped lawyers in the country; and it would be a most violent presumption to say, or even to think, that they were not thoroughly posted as to the laws, state and federal, concerning the interests and liabilities of their clients under this statute.

Through their counsel, the defendant must have been acquainted with the act of congress concerning interstate commerce, and the rulings of the commission (interstate) upon the act; and that act, in section 2, is in the very words of the fourth section of the act of our general assembly (Acts 1891, c. 320),—the law

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under which the defendant is indicted. The defendant could hardly be ignorant, in fact, of the decided cases reported by the interstate commerce commission on the matters about which the defendant is before the court. In the case of *Griffee v. Railroad Co.*, in Nebraska, before that commission (2 Interst. Commerce Com. R. 301),—the report and opinion filed nearly 10 years ago,—it was held, in effect, that free transportation to a passenger was in contravention of section 2 of the act (United States) to regulate commerce; that section being, as we have said, identical with section 4 of the act of our general assembly of 1891. In the same volume (page 359), in the case of *Slater v. Railroad Co.*, it was declared that free transportation, furnished, on an annual pass, to a person not embraced in one of the excepted classes, was illegal. In that case it was further said by the commission: "Carriers can reward persons, not in their stated and regular employment, for occasional services or benefits indirectly received, in other and better ways than by furnishing them with free transportation. It may be said that a pass costs the carrier little or nothing, and that, when the good will and occasional good words of a person who is able to influence the direction of traffic can be obtained so cheaply, it is a hardship to prevent the carrier from making use of the opportunity; but the evils in the unrestricted employment of free passes by common carriers had grown so great, and had become so apparent, both to the public and to the carriers themselves, that it was deemed by congress to be absolutely necessary to eradicate the whole system from interstate commerce, in order to put an end to the abuses which had grown beyond the limits of any other regulation or control. The law was framed, accordingly, prohibiting the giving of free transportation to passengers carried under substantially similar circumstances and conditions, as an unjust discrimination under the general terms employed, with only the exceptions made in section 22. * * *" In the third annual report of the interstate commerce commission

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(volume 3, p. 300, filed Nov. 30, 1889), it is stated that : "The statute [interstate commerce act] undoubtedly was framed to prohibit passes or free transportation of persons, as one of the forms of unjust discrimination, favoritism, and misuse of corporate powers that had grown into an abuse of large proportions, and become demoralizing in its influence, and detrimental to railroads, both in loss of revenue and in provoking public hostility. One of the minor and meaner phases of this abuse is the distinctive preference shown in various ways by employees, both in service and civility, to holders of passes, as if discrimination by free carriage includes discrimination in treatment of passengers. It is well known that persons who are carried free were, to a large extent, precisely the persons who had no claim whatever to such favors. They were officials and others, from whom free passes might be expected to secure reciprocal favors, and men of wealth and prominence, who rode at the expense of others less able to pay, or the passes were given to influence business. In nearly all cases not specially exempted by the act, the motive in demanding or in giving them was one deserving of no favor. The principle of equality under like conditions for the traveling public had been grossly violated by the railroads. Favored persons or classes of persons had been furnished free transportation at the expense of the general public by higher general charges to reimburse for gratuitous carriage." It is of interest to observe that it appears from that report that the returns of the railroad companies embraced therein show the largest number of interstate free passes issued were designated as "complimentary". The next most numerous class embraced steamship and transportation lines, officers (federal, state, and municipal), palace-car companies, and newspapers. Of state free passes, the largest number were issued to members of legislatures ; drovers with "complimentaries," next ; and United States, state, and municipal officers, newspapers, and shippers, next in numbers. In the investigation of this subject, as it affected the

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Boston & Maine Railroad Company (5 Interst. Commerce Com. R. 69 ; Dec., 1891), it was decided by the commission that the giving of free passes to others than those embraced in the exceptions was illegal. The opinion of the commission was in the following words : "The construction we give to section 2 of the act to regulate commerce is that, where the service by the carrier subject to the act is 'like and contemporaneous' for different passengers, the charge to one of a greater or less compensation than to another constitutes unjust discrimination, and is unlawful, unless the charge of such greater or less compensation is allowed under the exceptions provided in section 22, and that, where the traffic is 'under substantially similar circumstances and conditions' in other respects, it is not rendered dissimilar, within the meaning of the statute, by the fact that such passengers hold unlike (or, as sometimes termed, unequal) official, social, or business positions, or belong to different classes, as they ordinarily exist in a community, or are arbitrarily created by the carrier. Under this construction of the act, the practice of the defendant in giving free transportation, such as it concedes was issued to 'gentlemen long eminent in the public service', 'higher officers of states, and prominent officials of the United States', 'members of legislative railroad committees', 'persons whose good will is important to the corporation,' is unwarranted, unless the favored person also comes under some exception specified in section 22 of the act to regulate commerce." In this matter it was that Mr. Richard Olney (afterwards attorney general under Mr. Cleveland), who represented the Boston & Maine Railroad Company, stated in his brief that Mr. Chandler, who brought the proceeding for the people, was inspired to make the charges in the complaint by "personal spite and political considerations." The report goes on, however, to say that Mr. Chandler made a reply not without interest or point. In the same decision the commission said further: "Other utterances and decisions of the commission to the same legal effect have

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been made every year since its organization, and its construction of the act has been indicated by its repeated recommendations to congress to add other classes of persons to the exceptions (as they were always regarded by the commission) contained in section 22. We find not only these views held by the commission from its organization, but by the federal courts, when the question has arisen." The case of *Harvey v. Railroad Co.*, reported in 5 Interst. Commerce Com. R. 153, closes with the following declaration: "The fundamental and pervading purpose of the law is equality of treatment. It assumes that the railroads are engaged in a public service, and requires that service to be impartially rendered. It asserts the right of every citizen to use the agencies which the carrier provides on equal terms with all his fellows, and finds an invasion of that right in every unauthorized exemption from charges commonly imposed. No form of favoritism and no species of partiality seem more odious or indefensible than that which accords to personal influence or public station privileges not enjoyed by the community at large. The free carriage of certain persons merely because they occupy official positions or have acquired some measure of distinction, offends the rudest conception of equality, and contravenes alike the policy and the provisions of the statute."

As to the last position of the defendant (that is, the alleged practical construction which the common carriers and the favored passengers have put upon the statute,—the first giving and the last receiving free transportation just as they did before the enactment of the statute, and assuming that the general community have adopted that as the proper construction of the law), we have nothing to say, except that it would seem to all reasonable minds that such a construction could not be the proper one, and that the law, as often construed by the interstate commerce commission, which construction seems true to us, is a just and wholesome law. In the face of the clearly expressed provisions of the law, and in the face of the repeated

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constructions of that part of the federal statutes regulating interstate commerce, which is in precisely the same words in which our statute is framed upon the point now before us, the defendant took its chances. It has, in doing so, violated the criminal law of the state, and must abide the consequences, as all others ought to do who break the laws. It must be presumed that common carriers know well what they are doing in this matter. They are not, and neither do they wish to be considered, charitable institutions. They are corporations formed for profit and gain. And, whenever they grant a thing of value,—free transportation to a passenger not embraced in the excepted classes specified in the act,—they must be acting, as they think, on business principles, expecting a return upon their investments. If, in pursuing their business interests, they violate the law, they must abide the result. There is no error, and the judgment is affirmed.

DOUGLAS, J. (dissenting). I feel compelled to dissent from the judgment of the court, but in doing so I wish to express my unqualified concurrence in the able opinion of JUSTICE MONTGOMERY, except in so far as it necessarily conflicts with what it said herein. That free transportation, under whatever device it may be given, is prohibited by the act of 1891, unless covered by the statutory exceptions, is unquestionable, and I am glad that it has now been settled by a unanimous court. Such a construction is in strict accordance with the settled rules of judicial interpretation and with the highest principles of public policy. It is currently reported that 100,000 passes were issued in the state of North Carolina within the year 1897. Of our three leading railroad systems, one reported over 15,000 passes issued, while another reported 30,000. The defendant herein, the largest system of all, and having a direct pecuniary interest of vital importance before the legislature, refused to make any report, relying upon its legal exemption from compulsory self-crimination. Taking the estimate of 100,000 passes as correct, as it is 397 miles from Raleigh to Murphy, on the west,

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and still further to Elizabeth City, on the east, it is fair to assume that each pass would represent at least 100 miles of travel, equal to \$3.25 in fare. This would represent the equivalent of \$325,000 a year given to somebody, but to whom we do not know, and for what purpose we need not inquire. These figures may not be correct, but they are the best obtainable under the circumstances. It is needless to suppose that transportation of such great pecuniary value would be given without some return, either present or prospective; and, in any aspect, its continuance would be unjust to the public interest, and dangerous to the public welfare. Free transportation to so large an amount would necessarily place an additional burden upon the traveling public to make up the deficiency, while its irresponsible distribution would be a serious menace to public morality. So far, I fully concur in the opinion of the court; but, to convict a person charged with crime, it is requisite, not only to determine that a crime is committed, but also that the defendant is guilty of the crime. The defendant here admits the free transportation, but pleads want of intent. Ordinarily the admission of the forbidden act would be conclusive evidence of guilt; as in misdemeanors, at least, the intent to commit the act is the criminal intent, unless the statute itself constitutes the intent the gravamen of the offense. In this action, however, there seem to me so many peculiar circumstances that have never happened before, and may never happen again, as to take the case out of the usual rules of construction, and force us to regard it *sui generis*. If the act itself forbade the issuing of passes in express terms, it would be an end of the question. But it does so only by implication, as is shown in the opinion of the court. It is true, it seems to us a clear and necessary implication; but it evidently did not seem so to the higher officers of state and members of the legislature who accepted these passes. We can scarcely ask a clearer insight into the law, and a nicer sense of propriety from the soulless corporation, than we do from those who make and enforce the law.

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This act was ratified March 5, 1891,—more than seven years ago. Since then we have had four different legislatures, three governors, and seven different railroad commissioners, as well as two complete sets of solicitors. I do not mean to impute any improper motive to these men, many of whom I personally know, and whose names and characters are too well known to need any vindication from me; but is it not possible that the defendant may have been honestly misled in issuing passes to them, from the mere fact that they would receive them? The giving of a pass is only *malum prohibitum*, and not *malum in se*, and is neither as to the one that receives it. There is nothing innately wrong in it, further than that it is prohibited by law, and may lead to dangerous abuses. Moreover, section 5 of the act under consideration provides that the railroad commissioners “shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discrimination in the transportation of freight and passengers on the railroads in the state.” It was the imperative duty of the commission, without any outside suggestion, to make all just rules necessary for carrying out all the provisions of the act, the proper enforcement of which was the sole object of their official existence. We have held, in *Caldwell v. Wilson*, 121 N. C. 425, 472, 28 S. E. 554, that the commission is an administrative, and not a judicial, court; and this view is still more strongly expressed by the supreme court of the United States in *Reagan v. Trust Co.*, 154 U. S. 362, 397, 14 Sup. Ct. 1053, where it says: “Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislature.” It is their duty to actively enforce the law, and to prevent, and, if necessary, prosecute, all violations thereof that may come to their knowledge in any manner. They are the active instruments of its enforcement, and are not merely required to construe it upon a sworn complaint. For the purposes of their creative act, they are the grand inquest of the state, and should

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diligently inquire, and true presentment make, of all its violations. Any other construction of their powers and duties would destroy their usefulness, and make the commission a mere excrescence upon the judicial system of the state. As a court, their powers are very limited; but as a commission they are charged with grave and responsible duties of the greatest importance to the state, and are clothed with ample powers for their performance. While they may be compelled to appeal to the courts for the ultimate enforcement of their decisions, they possess powers beyond the jurisdiction of any court, and which, if properly exercised, may be made of inestimable value to the people. The mere fact of thorough investigation, and consequent publicity of existing abuses, will strongly tend to their correction. The jury find in their special verdict "that the officer of defendant who issued the annual pass was advised by counsel and by members of the railroad commission that he was not violating the law of the state"; "that there was no actual intent to violate the law upon the part of the officer of defendant issuing the pass." They further find that during the year 1897 passes were issued to members of the railroad commission, which, using the plural, must mean a majority of the commission, of whom there are only three. In a case of doubt, where the act was not expressly prohibited in words by the statute, to whom better could the defendant have gone than to those charged in express terms with its enforcement? What more positive answer could it have received than the answer of a majority of the commission that it was not unlawful, coupled with the personal acceptance of a pass? I do not question the integrity of the commissioners. They were doubtless honestly mistaken,—misled, perhaps, by the universal custom throughout the United States; but so, also, may have been the defendant. Is it not fair to say that it was innocently misled? The possible results of an adverse decision to the defendant are practically beyond calculation. If it has issued 50,000 passes a year for the two years within the statute, it is not probable that

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over 40,000 were issued to the excepted classes, leaving at least 60,000 violations of law. This would subject it to penalties of which the minimum would be \$60,000,000 and the maximum \$300,000,000. It is true this may not be the result. Solicitors may not prosecute. The executive may pardon, or the legislature may condone. But with this I have nothing to do. Upon the special verdict rendered in this case, and in view of the exceptional circumstances that force themselves upon our attention, I think that the defendant should be held not guilty, purely upon the ground of intent. This would end the matter, as hereafter there could be no honest mistake. As this court has now held that free transportation outside of the excepted classes is a violation of the act, no matter under what form or device it may be given, the mere performance of the act will hereafter be deemed conclusive evidence of its guilty intent. I am aware that in arriving at my conclusions I have been forced to ignore some of the general rules of judicial construction, but under the exceptional circumstances, appealing so strongly to my judgment, I do not feel that we should permit the bar sinister of an ironclad rule of interpretation to lie in cold obstruction across the conscience of the court.

NOTE.

Free Passes—Discrimination.—The issuing of passes to persons on account of their high social, business or official standing has been held in contravention of section 2 of the Interstate Commerce Act, of which section 4 of the North Carolina statute is a copy, it being adjudged that the language of the act, “render substantially similar circumstances and conditions” had no reference to the relative standing of individuals in the community, but to the nature of the service performed by the carrier. *Harvey v. Louisville, etc., R. Co.*, 3 Int. Com. Rep. 793, 5 Int. Com. Com. 153. See also *In re Boston, etc., R. Co.*, 3 Int. Com. Rep. 717.

Boyd v. Spencer

BOYD

v.

SPENCER *et al.*

(*Supreme Court of Georgia, June 8, 1898.*)

Carriers of Passengers—Tickets Available for Limited Time.*—Where a common carrier issues to a person a ticket between two points along its line of road, receiving the full amount the carrier is lawfully authorized to charge for such ticket, and there is no express contract between them as to the time in which the ticket shall be used, the carrier is bound to carry the person between the points designated at any time before the right of the purchaser would be lost under the law by lapse of time.

Same—Notice to Passenger.*—An entry on the ticket to the effect that it must be used within a time therein specified does not make an express contract, unless the purchaser, at the time the ticket was delivered, knew of the entry, and assented to its terms. (a) Whether or not a carrier could by express agreement with the purchaser limit the time in which a ticket for which full fare has been charged could be used, is not now decided.

(Syllabus by the Court.)

ERROR by plaintiff from Whitfield county superior court. *Reversed.*

Jones, Martin & Jones, for plaintiff in error.

Shumate & Maddox, for defendants in error.

COBB, J. Boyd sued the receivers of the railroad company for damages alleged to have been sustained on account of their refusal to honor a ticket for passage on their train, and ejecting him therefrom.

It appears from the evidence that the plaintiff bought—and paid full fare for—the ticket in question from the agent of the defendants at Dalton. The ticket had stamped upon it a statement that it would expire by midnight of the next day, but plaintiff's attention was not called to this fact by the agent, and he did not find it out until some time afterwards. After buying the ticket

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*See notes at end of case.

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the plaintiff discovered that he had made a mistake as to the ticket; he having intended to purchase one on another train which left Dalton near about the same time for Atlanta, the place of his destination. Upon discovering the mistake, he tendered the ticket to the agent, with a request that his money be refunded, which was refused. About three weeks after the purchase, plaintiff attempted to use the ticket on defendants' train; but the conductor refused to receive it, and compelled him to leave the train. At the conclusion of the plaintiff's testimony the court granted a nonsuit, and the plaintiff excepted.

A ticket issued to a passenger by a common carrier does not constitute the contract between the parties, unless made so by express agreement. It is in the nature of a receipt for the passage money, and is generally only a token, the purpose of which is to enable the carrier to recognize the bearer as the person entitled to be carried. Any other system by which the business of the carrier would be equally facilitated would answer the same purpose as the ticket system. Ray, Neg. Imp. Duties, p. 515, § 145; Fetter, Carr. § 275; Quinby v. Vanderbilt, 17 N. Y. 306. In the absence of any express agreement as to the time in which the ticket may be used, it would undoubtedly entitle the purchaser to a passage over the road of the carrier issuing the same at any time within the period in which the contract entered into between them might be enforced. Fetter, Carr. § 285; Hutch. Carr. § 576; Railroad Co. v. Spicker, 105 Pa. St. 142.

The question for decision in the present case is whether or not a ticket for which full fare has been paid, and which has a limitation as to time stamped thereon, but of which the purchaser has no notice at the time of the purchase, would entitle such purchaser to a passage on the road of the carrier issuing the ticket after the time stamped on the ticket has expired. As above stated the carrier would be bound to carry the purchaser of an unlimited

Carriers of Passengers—Tickets Available for Limited Time.

Name—Notice to Passenger.

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ticket over its line of road at any time before the rights of such purchaser would be lost under the law. Section 2276 of the Civil Code provides that: "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts, or tickets sold. He may make an express contract, and will then be governed thereby." The ticket in the present case not being the contract between the parties, because not made so by express agreement, no limitation as to time stamped thereon will be binding on the purchaser. See *Phillips v. Railroad Co.*, 93 Ga. 356, 20 S. E. 247. The testimony for the plaintiff makes substantially this case: He purchased a full-fare ticket, without any notice of limitation as to time, and did not discover this fact until some time afterwards. Relying upon the absence of any special contract as to the time in which the ticket might be used, he boarded the train of the defendants, and sought to secure a passage thereon on the faith of the ticket. Upon presentation of the ticket, passage was refused, and, upon his refusal to pay the fare demanded, he was ejected from the train. Under these facts, we think he was entitled to go to the jury. It may be that where, under an express agreement, a ticket is sold at less than the usual rates, on condition that it shall not be used after a specified time, a purchaser would be bound by such a stipulation. The question in the present case, however, is not whether a carrier can by express agreement limit the time in which the ticket shall be used, but whether, under the plaintiff's evidence, it has been shown that he is not entitled to recover, because a special contract had been made with him, limiting the time in which his ticket should be used. A ticket without a limitation as to time being good for use any time within the statute of limitations, the burden of showing that there was an express contract limiting its use to a certain time is on the carrier. In order to make a *prima facie* case in controversies of the character now under consideration, it is only necessary for the plaintiff to prove that he had a contract of carriage

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which has been disregarded by the defendant. The carrier might defend by showing an express contract limiting the time in which it was to be performed. The plaintiff could, however, successfully meet this defense by proving that he had no notice of a limitation upon the ticket, and did not assent to the same. The issues thus raised are properly for determination by a jury. The case of *Lewis v. Railroad Co.*, 93 Ga. 225, 18 S. E. 650, does not conflict with the ruling here made. In that case the purchaser was furnished by the railroad agent with the character of ticket which he was accustomed to buy, from which knowledge of its contents might have been reasonably inferred, and the ticket was sold at a reduced rate.

The evidence in the record showing that a *prima facie* case for the plaintiff was made out, it was error to grant a nonsuit. Judgment reversed. All the justices concurring.

NOTES.

Carriers of Passengers—Whether Tickets Are Contracts.—A passage ticket, in the ordinary form, is merely a voucher, token or receipt adopted for convenience, to show that the passenger has paid his fare from one place to another, and does not constitute the contract of carriage. *Cleveland, etc., R. Co. v. Bartram*, 11 Ohio St. 457; *Baltimore, etc., R. Co. v. Campbell*, 36 Ohio St. 647, 3 Am. & Eng. R. Cas. 246, 38 Am. Rep. 617; *Frank v. Ingalls*, 41 Ohio St. 560, 21 Am. & Eng. R. Cas. 277, 58 Am. Rep. 135; *Logan v. Hannibal, etc., R. Co.*, 77 Mo. 663, 12 Am. & Eng. R. Cas. 141; *Johnson v. Concord R. Co.*, 46 N. H. 213, 88 Am. Dec. 199; *Gordon v. Manchester, etc., R. Co.*, 52 N. H. 596, 13 Am. Rep. 97; *Hibbard v. New York Cent. R. Co.*, 15 N. Y. 455; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Van Buskirk v. Roberts*, 31 N. Y. 661; *Mauritz v. New York, etc., R. Co.*, 23 Fed. Rep. 765, 21 Am. & Eng. R. Cas. 286; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, 10 Am. Rep. 711; *Burnham v. Grand Trunk R. Co.*, 63 Me. 298, 18 Am. Rep. 220. The English courts seem to lay down a doctrine contrary to that of the text. *Henderson v. Stevenson*, L. R., 2 H. L. Sc. App. 470; *Great Western R. Co. v. Pocock*, 28 Wkly. Rep. 49; *Burke v. South Eastern R. Co.*, 5 C. P. Div. 1. In *Richmond, etc., R. Co. v. Ashby*, 79 Va. 130, 52 Am. Rep. 620, a passenger's ticket was held to be both a receipt and a contract—the acknowledgment of

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the receipt of the passenger's fare, and of the obligation to carry him for the purpose and upon the terms specified.

A distinction is taken between the case of a shipper receiving a bill of lading, on account of his shipment, and a traveler receiving a passage ticket for the carriage of himself and baggage over the carrier's road. In the one case the shipper is supposed to understand and know that, according to commercial usage, a bill of lading is essential to the regular and safe transportation of property, which is shipped and carried as freight, and that of necessity, it must constitute the contract of shipment and carriage. In the other case, the ticket is ordinarily regarded as a mere voucher for the money paid for it; a token or evidence of the purchaser's right to be carried, or have his baggage carried, a certain distance. *Mauritz v. New York, etc., R. Co.*, 23 Fed. Rep. 765, 21 Am. & Eng. R. Cas. 286.

A ticket for the transportation of a passenger is not a contract of itself; it is simply evidence of a contract. *Kansas City, St. J. & C. B. R. Co. v. Rodebaugh*, 34 Am. & Eng. R. Cas. 219, 38 Kan. 45, 15 Pac. Rep. 899.

The ticket given to a passenger, upon payment of his fare, is a receipt merely, and not a contract. *Logan v. Hannibal & St. J. R. Co.*, 12 Am. & Eng. R. Cas. 141, 77 Mo. 663; *Lewis v. New York C. R. Co.*, 49 Barb. (N. Y.) 330; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225.

Tickets are vouchers that the fare has been paid. They do not constitute the contract with the passenger, although they may and often do have upon them some condition or limitation which enters into it and forms part of it. The contract is made up of the ticket and the rules and regulations established by the carrier, and is what is known in law as an entire contract. *Terry v. Flushing, N. S. & C. R. Co.*, 13 Hun (N. Y.) 359.

A railroad ticket constitutes a contract between the carrier and the holder. *Sears v. Eastern R. Co.*, 14 Allen (Mass.) 433.

Tickets Available for Limited Time.—When upon its face a ticket is issued available for a limited time only, a passenger cannot claim to ride by virtue of it after the expiration of the time limited. *Farewell v. Grand Trunk R. Co.*, 15 U. C., C. P. 427; *Briggs v. Grand Trunk R. Co.*, 24 U. C., Q. B. 510; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617; *Hill v. Syracuse, etc., R. Co.*, 63 N. Y. 101; *Barker v. Coffin*, 31 Barb. (N. Y.) 556; *Pier v. Finch*, 24 Barb. (N. Y.) 514; *Boice v. Hudson River R. Co.*, 61 Barb. (N. Y.) 611; *Wentz v. Erie R. Co.*, 3 Hun (N. Y.) 241; *Nelson v. Long Island R. Co.*, 7 Hun (N. Y.) 140; *Gale v. Delaware, etc., R. Co.*, 7 Hun (N. Y.) 670; *Boston, etc., R. Co. v. Proctor*, 1 Allen (Mass.) 267; *Shedd v. Troy, etc., R. Co.*, 40 Vt. 88; *State v. Campbell*, 32 N. J. L. 309; *Pennington v. Philadelphia, etc., R. Co.*, 62 Md. 95, 18 Am. & Eng. R. Cas. 310; *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532, 6 Am. Rep. 345; *Heffron v. Detroit City R. Co.*, 92 Mich. 406; *Powell v. Pittsburgh, etc., R. Co.*, 25 Ohio St. 70; *Terre Haute, etc., R. Co. v. Fitzgerald*, 47 Ind. 79; *Howard v. Chicago, etc., R. Co.*, 61 Miss. 194, 18 Am. & Eng. R. Cas. 313; *McRea v. Wilmington, etc., R. Co.*, 88 N. Car. 526, 18 Am. & Eng. R. Cas. 316; *Lillis v. St. Louis, etc., R. Co.*, 64 Mo. 464.

The reasonableness of a regulation of this character is obvious. It enables the carrier to provide requisite car-room for all holders of tickets who are entitled to ride within a particular period or upon

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a particular train. Such limitations are generally printed upon the ticket, and may then be said to constitute a part of the contract rather than a rule governing the rights of the parties. *State v. Campbell*, 32 N. J. L. 309. It is said, however, that the ignorance of a passenger that his ticket is, by the rules of the company, limited to a particular day, makes no difference, because it is his duty to inform himself as to that matter. *Johnson v. Concord R. Co.*, 46 N. H. 213, 88 Am. Dec. 199.

Same—Ticket as Notice to Passenger.—A provision in a ticket limiting the responsibility of a carrier for baggage, is ineffectual in the absence of evidence that the plaintiff's attention was especially called to it. *Wiegand v. Central R. Co. of New Jersey* (Penn., 1896), 5 Am. & Eng. R. Cas., N. S., 61.—See also *note*, p. 66, *et seq.*

Where a passenger is unable to read the language in which a ticket is printed, and no explanation is made by the agent selling it, he is not bound by special terms and conditions printed thereon. *Mauritz v. New York, L. E. & W. R. Co.*, 21 Am. & Eng. R. Cas. 286, 23 Fed. Rep. 765.

If any attempt at imposition or deception appears, or any device be resorted to calculated to mislead the passenger or shipper, or to keep from his notice any matter of the printed or written indorsements on the receipt or ticket which are intended to affect the liability of the carrier, they will not avail the latter if they have been overlooked by the former. *Louisville, N. A. & C. R. Co. v. Nicholas*, 4 Ind. App. 119, 30 N. E. Rep. 424.

Where a limitation is inserted in a ticket, that the company will only be liable for a certain amount in case of loss of baggage, the limitation is not binding on the passenger unless he agrees to it with full knowledge; and where the ticket is printed with a blank space for the passenger's signature, but he is not requested to sign it, and does not do so, there is no completed contract, and the limitation is not binding on him. *Kansas City, St. J. & C. B. R. Co. v. Rodebaugh*, 34 Am. & Eng. R. Cas. 219, 38 Kan. 45, 15 Pac. Rep. 899.

The purchaser of a ticket does not, by his mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon, in the absence of actual knowledge of them. *Kent v. Baltimore & O. R. Co.*, 31 Am. & Eng. R. Cas. 125, 45 Ohio St. 284, 10 West Rep. 457, 12 N. E. Rep. 798.

Where a ticket is issued with a memorandum thereon limiting the liability of the railroad, the burden is on the company to prove that the passenger knew of such limitation and assented thereto. *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65, 1 Am. Ry. Rep. 559.

Same—Held Binding on Passenger.—When a passenger ticket is free from anything calculated to mislead or deceive the person buying it, and professes to and does set out a special contract between the carrier and passenger, so legibly and plainly that it will be carelessness on the part of the latter to overlook it, there can be no good reason why such a "contract ticket" should not be held as conclusive upon the passenger as bills of lading or the receipts of the common carrier are upon the shipper or bailor of goods. In such case, the passenger cannot be heard to say that he did not read the special contract contained in his ticket. He is expected to read it, and if he has the opportunity to read it and fails to do so, he

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is nevertheless bound by its stipulations. Louisville, N. A. & C. C. R. Co. v. Nicholai, 4 Ind. App. 119, 30 N. E. Rep. 424.

Although a passenger traveling by a freight train is unaware of a condition in his ticket relieving the company from any liability for injuries in any way arising from the fact that a passenger coach is attached to a freight train, he is bound by such condition and the company is exempt from liability for any accident within its scope. Johnson v. Great Southern & W. R. Co., 9 Ir. C. L. 708, 3 Ry. & C. T. Cas. xiv.

JENSON

v.

GREAT NORTHERN RY. CO.

(*Supreme Court of Minnesota, May 3, 1898.*)

Employing Incompetent Fellow Servant—Assumption of Risk.*—While a servant impliedly assumes the risk of negligence by his fellow servants, yet he does not assume any risk on account of the negligence of the master, which is unknown to him; hence the fellow-servant rule has no application to a case where the master is negligent in employing or retaining in his service a careless and incompetent servant, who by his negligence injures his co-servant, who has no notice of his character.

Same.—The complaint herein is to the effect that the plaintiff was injured, while in the service of the defendant, by his incompetent and careless fellow servant (whom the defendant then knew to be such, but the plaintiff did not) carelessly and negligently causing an ax to fall upon him while each was in the line of his employment. *Held*, that complaint states a cause of action.

(Syllabus by the Court.)

APPEAL by plaintiff from Otter Tail county district court. *Reversed.*

H. Steenerson, for appellant.

C. Wellington and *W. R. Begg*, for respondent.

START, C. J. Appeal by plaintiff from an order sustaining a demurrer to his complaint. The complaint alleges: That the defendant in the month of January, 1896, was engaged in the work of constructing an ice break, made

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*See note, 4 Am. & Eng. R. Cas., N. S., 447.

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of piles, for the protection of its bridge across the Red River of the North at Moorhead. The plaintiff, who was one of a crew of six to eight men under the charge of a foreman, was at work on a lower cross girder connecting the piles, when the defendant, by its foreman, carelessly and negligently directed another workman belonging to the crew to go, with his tools, consisting of axes, saws, and augers, upon a loose plank or staging above the plaintiff, and fasten the girders along the upper end of the piles; thereby rendering the place where the plaintiff was then working dangerous. That the defendant thereby, then and there, carelessly, negligently, and unmindful of its duties to the plaintiff, caused a certain hand ax to fall and injure the plaintiff. "That the workman so placed and set to work over the place where the plaintiff was working was an incompetent and careless workman and so known to be by the defendant at that time, and was unknown to this plaintiff; and said workman, while so engaged, carelessly and negligently caused an ax lying loose upon the staging as aforesaid to fall down upon the plaintiff's head, and the plaintiff was thereby seriously wounded and cut in his head, and his skull fractured." If this complaint states a cause of action, it is only because it alleges that the plaintiff's fellow workman who carelessly dropped the ax which injured him was incompetent and careless, and that the defendant, knowing it, retained him in its service. This is so for the reason that the act of the foreman, whether he is to be regarded as a vice principal or otherwise, in directing the plaintiff's fellow workman to work with his tools on a loose staging over him was not the direct cause of his injury. The cause of the plaintiff's injury was the act of an incompetent and careless fellow servant in causing an ax to fall upon him. For this negligence the defendant is not liable if it was itself free from negligence in the premises; that is, if it did not knowingly retain such servant in its service. If it did, it is liable; for, while a servant impliedly assumes

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the risk of negligence by his fellow servants, yet he does not assume any risk on account of the negligence of the master which is unknown to him; and where the negligence of the latter in retaining an incompetent or careless servant combines with the negligence of such servant, and the two contribute to the injury of another servant, the master is liable. Or, in other words, the fellow-servant rule has no application to a case where the master is negligent in employing or retaining in his service an incompetent or careless servant, who by his negligence injures another servant, having no notice of such incompetency or carelessness. In such a case the master is liable for the act of the servant whom he negligently retains. Therefore the complaint in this action states a cause of action if it shows on its face that the plaintiff was injured by the negligence of an incompetent and careless fellow servant, and that the defendant was negligent in retaining him in its service. The complaint is to the effect that the plaintiff while in the service of the defendant, was injured by his incompetent and careless fellow servant (whom the defendant then knew to be such, but the plaintiff did not) carelessly and negligently causing an ax to fall upon the plaintiff's head while each was in the line of his employment. The allegation that the fellow servant was careless necessarily implies that he was habitually negligent, for a careless man is one whose nature or habit is not to take ordinary care,—one who is negligent, unconcerned, and heedless. The defendant according to the allegations of the complaint, knowingly had such a man in its service, and knowingly subjected the plaintiff, who did not know that he was careless, to the risk of injury from the negligence of such a fellow servant, whereby the plaintiff was injured. Therefore the complaint states a cause of action. Order reversed.

Same.

Flippin v. Kimball

FLIPPIN

v.

KIMBALL *et al.**(Circuit Court of Appeals, Fourth Circuit, May 3, 1898.)*

Injury to Employee—Juries in Chancery Suits.—A railroad employee, having been injured while the road was in the hands of receivers, intervened in a suit in equity. *Held*, that he thereby waived his right to a trial by jury, a court of equity, where the case is one of equitable jurisdiction only, not being bound to submit any issue of fact to a jury, and, if it does so, is at liberty to disregard the verdict and findings of the jury.

Fellow Servants—Section Foreman and Laborers.*—The foreman or acting foreman of a wreck car, at the wreck, is the fellow servant of one of a gang of men gathered up as had been most convenient, and engaged in removing the wreck.

APPEAL by petitioner from the circuit court of the United States for the Eastern district of Virginia. *Affirmed.*

Upon bill filed in the court below by the Fidelity Insurance, Trust & Safe-Deposit Company *et al.* against the Norfolk & Western Railroad Company, and the proceedings thereunder, the appellees,

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F. J. Kimball and Henry Fink, had been appointed receivers. While the company was in operation under them, the appellant, one of their employees, was injured. He intervened in the main cause by petition, setting forth the facts attending his injury, with this alternative prayer for leave to file his petition, and "to sue the receivers in the circuit court of the United States for the Eastern district of Virginia, on its common-law side, and that your honors may order and direct that the said receivers do appear and defend said suit whenever the same is instituted, or that your

*As to Whether Section Foreman and Laborers are Fellow Servants, see Illinois Cent. R. Co. v. Bolton, 9 Am. & Eng. R. Cas., N. S., 868, and *foot-note*.

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honors will make the petitioner a party to this cause now pending, and direct an issue out of chancery to settle the facts above recited, and will award such damages unto your petitioner as he is entitled to recover hereby," and for general relief. On motion of the petitioner leave was given to him to file the petition, which was done, and the receivers were ordered to answer the same. The answer was filed as directed, and on motion of the petitioner a jury was impaneled to try the issues raised upon petition and answer. These issues grew out of the allegations of these pleadings. The petition, after stating that the petitioner was in the employment of the receivers as a yard hand, and that his duties were confined to labor upon section 22, alleges that he was ordered by the foreman of his section to go with him to the scene of a train wreck upon section 21, for the purpose of assisting in removing a certain wrecked train of the company from the track; that he had no knowledge of this kind of work, but that he obeyed orders, and went to the wreck, and worked under the direction and control of Emmett Ferrell, sometimes called Hanna, who was not a regular manager of such work, but was that day a substitute for B. C. Hanna, the regular manager; that by reason of the inexperience of Emmett Ferrell, sometimes called Hanna, and by reason of the negligence and carelessness of the officers and agents of the receivers, and also by reason of defective appliances used in and about the wreck, the derrick which was then and there used was negligently and carelessly upset, and fell over and upon the left foot of the petitioner, crushing it, and necessitating its amputation. The answer says that Emmett Ferrell (called Hanna in the petition) was not manager of the wreck car, but acting foreman wrecker. It denies that he was either ignorant or inexperienced, and avers that he was thoroughly competent for the work. It denies that there was any carelessness or negligence on the part of any of their agents or employees, or that there were any defective appliances, or that defective appliances had anything to do with the accident, which

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was one of those inexplicable and unavoidable accidents that are liable to occur with the best management; and that the danger, if any, was as apparent to petitioner as any one else. A jury having been impaneled, testimony was taken before the judge who ordered the trial and a verdict was found by the jury on the issues joined for the petitioner, fixing his damages at \$13,500. The respondents entered a motion to set aside the verdict on the grounds that it was contrary to the law of the case, contrary to the evidence in the case, unsustained by the evidence, and that the damages were excessive. The court below, "being of the opinion that the negligence, if any, was that of a fellow servant with petitioner, and that the damages awarded are excessive," set aside the verdict, and dismissed the petition. The case comes here on five assignments of error. The first, second, and third assign as error the setting aside of the verdict, and not entering a decree thereon for the petitioner. The fourth assigns as error the dismissal of the petition on the ground of negligence of a fellow servant, because the persons through whose negligence the accident occurred were not fellow servants of the petitioner, because the accident was caused by defective appliances, and because the person whose negligence caused the accident was known to be unfit and improper. The fifth assigns as error the holding the damages excessive.

Edmund Waddill, Jr., and Edgar Allen, for appellant.

Robert M. Hughes, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and PAUL, District Judge.

SIMONTON, Circuit Judge. (after stating the facts.) The appellant, Flippin, could have proceeded in an action at law against the receivers without leave of the court. 25 Stat. 433, Act 1888. Of his own accord he intervened in a suit in equity, and submitted himself to the jurisdiction of the court. By doing this he waived his right to a trial by jury, for it is a fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity juris-

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ployee—Juries in
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diction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or perplexity. *Barton v. Barbour*, 104 U. S. 133. This case being one of equitable jurisdiction only, the court was not bound to submit any issue of fact to a jury, and, having done so, was at liberty to disregard the verdict and findings of the jury, either by setting them, or any of them, aside, or by letting them stand, and allowing them more or less weight in its final hearing and decree according to its own view of the evidence in the cause. *Improvement Co. v. Bradbury*, 132 U. S. 509, 10 Sup. Ct. 177. So, when the court below, in accordance with the prayer of the petition, ordered an issue out of chancery to try the issues, the verdict was only advisory, and not conclusive upon the court. It had the right to disregard it, and even to render a decree contrary to it. *Watt v. Starke*, 101 U. S. 247. These authorities dispose of the assignments of error which look to the result of the verdict of the jury. It was for the court below alone to determine its force and effect, and this court cannot deny its right to disregard it.

Having set aside the verdict, the circuit court proceeded to consider the case, and dismissed the petition. This was in accordance with rules of equity procedure. A similar course was sustained by the supreme court in *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298. It is alleged as error that the court dismissed the petition upon the ground that the negligence, if any, causing the accident, was that of a fellow servant of the petitioner. The assignments of error proceed upon the grounds that the foreman in charge of the wreck was wholly incompetent for the performance of his duty; that the appliances used were defective, and that superior officers of the receiver were present directing, in whole or in part the operations; and that the foreman in charge of the wreck was entirely inefficient; and that in no event was he the fellow servant of petitioner. As this is an appeal in equity, we must

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examine the testimony, which is spread out in full on the record. The petitioner, at the time of the accident, was 24 years of age. He had been in the employment of the receivers one month as a section hand, and had seen service before on railroads for two months and a half. The wreck occurred about two miles from Crewe, where he was employed, and he was ordered by his section master to go with other hands to the wreck to assist in clearing the track. The gang engaged in this work was made up of hands from several parts of the road, who were under the direction of Emmett Hanna or Ferrell. This man was the adopted son of Capt. B. C. Hanna, who was wrecking master, and was his chief assistant, acting for him in his absence. On this day the elder Hanna was engaged on another part of the road. The evidence shows that Emmett Ferrell had the perfect confidence of his chief; that, notwithstanding his youth (he was either 22 or 23), he had had large experience; and he enjoyed among the railroad people the reputation of a skillful and efficient man in charge of wrecks. It also appears from the evidence that on the day of the accident he was in full charge, and although there were present Sowers, the track supervisor, Wells, the road foreman of engines, Sander-son, assistant superintendent of the motive power, and perhaps other officials, none of them assumed charge of the wreck, as it was not in the line of their duties, but left everything to Ferrell. Nor does the preponderance of the evidence lead to the conclusion that the appliances used were defective. It is true that in the beginning a rope used at the derrick broke, but nothing occurred as the result of it, and, the rope having been mended, or another substituted, no further break occurred. The accident probably occurred because, the cars not having been fastened to the track, there was too much weight upon the derrick, and a lateral strain. These caused it to upset and so the petitioner was hurt. If there was negligence in this, it was the negligence of Emmett Ferrell, who was at the time directing the operations, and himself assisting in arranging the blocks to the

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wheels of a car. These blocks were not regularly prepared, but were made of fence rails, parts of cross-ties, and wood picked up on the track. Evidence was offered showing that on one system of railways wrecking cars always carried blocks prepared for and suitable to this purpose. But there is no evidence of a custom or usage of this character; nor is there evidence that ordinary blocks, obtained as those were on this occasion, do not serve their purpose. It must be remembered that there is no presumption of negligence in this case against the defendant, the action being by an employee against an employer. The burden is on the petitioner. *Railroad Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707. So the case really turns upon the point, which controlled the circuit court, if the accident was the result of negligence, the negligence was that of Emmett Ferrell; and the question is was he the fellow servant of the petitioner? He was the foreman or acting foreman of a wreck car at the wreck. His position is thus explained by Mr. Sanderson, Fellow Servants—
Section Foreman
and Laborers. who seems to be an intelligent witness:

"He is a boss or acting foreman at that time in charge of a gang or collection of men who may have been gathered up as has been most convenient; exactly the same relative position as a section foreman or car foreman would be with a gang working under him."

Indetermining this question it is unnecessary to quote the multitude of decisions bearing upon it, often contradictory, and frequently obscure. The general rule is well stated in a note to *Railway Co. v. Smith*, 8 C. C. A. 670 (s. c. 59 Fed. 993), quoting for its support many authorities:

"It makes no difference in the application of the rule exempting the master from liability for injuries to his servants for the acts of the co-servants that the one receiving the injury is inferior in grade and subject to the orders of the one by whose negligence the injury is caused if both are engaged in the same general business, accomplishing one and the same general purpose." We held in *Thom v. Pittard*, 8 U. S. App. 597, 10 C.

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C. A. 352, and 62 Fed. 232, that section men and laborers on repair trains, being engaged in the common purpose of keeping the railroad in order, are fellow servants. In *Deavers v. Spencer*, 25 U. S. App. 411, 17 C. C. A. 215, and 70 Fed. 480, this court held that a track hand, who was injured by the alleged negligence of the track foreman while he was working on a railroad, was the fellow servant of the foreman, and could not recover against the receivers for the injuries he had suffered. In the circuit court of appeals of the Fifth circuit—*McGrath v. Railway Co.*, 23 U. S. App. 86, 9 C. C. A. 133, and 60 Fed. 555—it was held that “a railroad employee, who was one of a gang of men employed to remove a wreck, cannot recover from the company for injuries caused by the negligence of the wreck master, who has charge of the wrecking car.” And in *Railway Co. v. Rogers*, 13 U. S. App. 547, 6 C. C. A. 403, and 57 Fed. 378, the same court held that the acting foreman of a gang of laborers engaged in repairing a bridge was the fellow servant, engaged in the same employment, with a member of the gang who was injured by the falling of a piece of timber during the repairs of the bridge. Besides this, the petitioner is a man matured. He was in the employment of the receivers as a section hand to work on the track. He was not placed in a position of undisclosed danger; but he was doing work whose risks were obvious. Necessarily he assumed those risks when he went on with his work, and the mere happening of the accident cannot impute negligence to his employer. *Kohn v. Mc Nulta*, 147 U. S. 238, 13 Sup. Ct. 298. The judgment of the circuit court is affirmed.

Cornell v. Manistee & N. E. R. Co

CORNELL

v.

MANISTEE & N. E. R. Co.

(*Supreme Court of Michigan, May 24, 1898.*)

Injury to Stock—Duty to Fence Track.*—It is not the duty of railroad companies to fence their tracks at points used for the shipment or unloading of freight, and this exemption is not limited to regular stations.

Findings and Evidence.—Plaintiff cannot complain because the jury were permitted to find that the point where the stock was killed was a loading point, such fact clearly appearing from the evidence.

Contributory Negligence.—In such action it was not error to permit the jury to consider the question of contributory negligence, it having appeared from the evidence that it was not the duty of the company to fence at such point, and plaintiff having alleged negligence in the management of the train.

Prejudice against Railroads—Charge.—Plaintiff cannot complain because the court cautioned the jury against a popular prejudice against railroads, such caution having been coupled with an injunction to decide impartially.

ERROR by plaintiff to Manistee county circuit court.
Affirmed.

Smurthwaite & Fowler, for appellant.

T. J. Ramsdell, for appellee.

HOOVER, J. The plaintiff's action was brought to recover damages for the alleged negligent killing of three colts, which were run over by the defendant's train. These colts were pastured upon premises of the plaintiff which were not fenced, and they strayed from these premises into the adjoining woods, and found their way, across lands of other proprietors, to the defendant's railway, which was not fenced at the place where the colts approached it. They went upon the track, and were run down and killed. It was the claim of the defendant that it was not required

Case Stated.

*See note at end of case.

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to fence its track at this place, for the reason that it was used as a storing and loading place for ties, logs, and other forest products, which constituted the principal traffic of the road, the country being comparatively new. It is conceded that this was not a stopping place for passenger trains. The testimony of the civil engineer shows that from the station grounds at Copemish the track is fenced for about a mile and a half south, and nearly to the point where the colts were killed. From that point there is a stretch of about eight miles to a place called "Manistee Crossing," or beyond, that there is no fence. At a distance of the length of 54 rails south of the place where the colts were killed there is a switch for a side track, which runs north 27 rails or more. This switch, and the main track north from the switch towards the place where the colts were killed, and including the place at which they entered upon the right of way, were used as a piling and loading ground for forest products, and skids were constructed there to facilitate such loading. There are other such places, and the engineer testified that the company was in the habit of making them for persons who have timbered lands along the line of road, which the company wishes to reach, and that it would not be feasible to do this if a fence were to be placed along the way at such points. It appears that the land adjoining the road, at the point in question, was owned by the Bulkley & Douglass Lumber Company, but that the railroad company bought ties there from one Wooliver, and that the State Lumber Company shipped some forest products from that point. Wooliver obtained the ties for the Bulkley & Douglass Lumber Company. It does not appear where the State Lumber Company obtained the products shipped by it.

We think that the evidence fairly shows that the skidways and switch were placed there for the mutual convenience of the defendant and the Bulkley & Douglass Lumber Company, which owned a large tract of timbered lands at that point, and that it had no other

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use, except, possibly, when one or more persons may have been permitted to draw products across the Bulkley & Douglass lands for shipment from this switch. We find nothing to indicate that the general public had access to this place, though it does not appear that they were forbidden. The learned circuit judge permitted the jury to find that this was a *bona fide* shipping point upon defendant's road necessary to its convenience and that of the public.

The courts generally hold that statutes requiring railroad companies to fence their railways are not applicable to such portions of the roads as are devoted to the shipment or unloading of freight, or the taking on or discharging of passengers, and this exemption is not limited to regular stations. It includes flag stations, and it extends to yards and switches, and so much of the main track contiguous thereto as is necessary to the safe, expeditious, and convenient handling of cars to be switched or handled at such point. A discussion of this subject, with numerous authorities, will be found in Elliott on Railways, at section 1194. Several cases in our own state recognize the doctrine. Thus, in *Schneekloth v. Railway Co.* (Mich.) 65 N. W. 663, a triangular piece of ground at the intersection of two country highways was exempted from fences and cattle guards, although there was no building there, nor any agent, and trains stopped there merely when they had passengers or freight to deliver or when some one displayed a signal erected for the purpose. The traffic at that place was probably much less than in the present case, and it does not even appear that there was a switch. In the case of *McDonald v. Railway Co.* (Mich.) 71 N. W. 859, a spur track was built at a point remote from a station. This spur extended two miles to the plant of a concern engaged in the manufacture of lime, and a part of this switch was used for switching passenger trains at times and was not fenced. The court held that, although there was no public station there, the keeping open of this switch was necessary

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for the convenience of the public, and there was no obligation to fence it. See, also, *Rabidon v. Railway Co.* (Mich.) 73 N. W. 386.

The evidence indicates that this railroad runs through a new and heavily timbered country, in which the principal industries relate to the removal of the timber. Upon these the railroad is largely dependent for its business. We may take judicial notice that landed proprietors will seek the shortest possible route to the railroad with their products, and it is probable that it will be mutually beneficial for the railroad company to accept such freight upon the premises of large operators, where this is feasible, as is done by all roads, where manufacturing industries justify it. We do not find it necessary to say that a railroad company may safely omit to fence wherever they can find a little freight to be shipped.

In this case the jury was permitted to find, and we think that the evidence clearly showed, that this loading place was one fully justified by the conditions, and the court might properly have so instructed the jury.

Findings and Evidence.

He did not, however, and even left the question of good faith to the jury, which we think was unnecessary under the proof, but not injurious to the plaintiff.

Inasmuch as the court might have charged the jury that this shipping point was not required to be fenced, the question of contributory negligence is entitled to consideration, in connection with the claim

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that the train was negligently managed.

The court left this question to the jury, because, as he told the jury, there was testimony tending to show that the habit of horses was such that they would not be likely to attempt to pass from a cleared lot into or through the woods. We think the course taken was as favorable to the plaintiff as he had a right to ask. The same may be said of the instructions in relation to the claim that the killing of the colts was wanton.

The judge cautioned the jury against a popular

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prejudice against railroads. We are not prepared to say that such caution was improper. It was coupled with an injunction to be impartial and to decide justly. We think the matter was within the discretion of the circuit judge, and that there was no just cause to complain of what was said in this connection. The judgment is affirmed. The other justices concurred.

Prejudice against
Railroads—
Charges.

NOTES.

Duty to Fence at Switches and Sidings.—A company is not required under Ind. Rev. St. 1881, § 4031, to fence its track at places where it would interfere with the operation of the road or the transaction of its business, or where it would interfere with the public in doing business with the company, or where it would imperil the lives of the company's employees, such as at switches where freight is loaded and unloaded. *Evansville & T. H. R. Co. v. Willis*, 19 Am. & Eng. R. Cas. 565, 93 Ind. 507.

Or where a side track is laid alongside of a grain elevator. *Lake Erie & W. R. Co. v. Kneadle*, 19 Am. & Eng. R. Cas. 568, 94 Ind. 454.

But side tracks not at stations or depots, and such parts of side tracks as do not constitute a part of the depot yard, may well be held to be within the statute. *Chicago, B. & Q. R. Co. v. Hans*, 111 Ill. 114.

A company is not required to fence so much of its switch grounds as are necessary to remain open for the use of the public and the necessary transaction of business at its depot; and as to what is necessary is not left to the arbitrary judgment of the company, but is a question for the courts. *Vanderworker v. Missouri Pac. R. Co.*, 51 Mo. App. 166.

Where, from the agreed statement of facts in a case, it is made to appear that the corporate limits of a city, with buildings thereon, extend along one side of the various side tracks of a railway, the land on the other side not being platted; that the side tracks thus established were necessary and proper for the transaction of the business of the railway, and that it would be inconvenient and unsafe to the employees of the company if a cattle-guard and fence were erected—the company is not required to fence its tracks at that point, and will not be liable for stock killed by its engines and cars at that place unless guilty of negligence. *Chicago, B. & Q. R. Co. v. Hogan*, 27 Neb. 801, 43 N. W. Rep. 1148.

Where a company had a switch outside the limits of an unincorporated village, but adjacent to the same, and in this locality there was a warehouse and a store, and it was used by the public as much as any portion of the village, and the switch was so located that it could not be reached by teams for loading and unloading if there was a fence erected there, the facts were sufficient to justify the inference that the place was ground open to the public, where a

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fence was not required. *Toledo, W. & W. R. Co. v. Chapin*, 66 Ill. 504.

While a railroad company is under no obligation to fence its depot and station grounds in order to protect itself from liability for stock killed, such is not the case where it has a switch merely, unless the same is upon or a part of a station ground; and the *onus* is upon the company to show this. *Comstock v. Des Moines Valley R. Co.*, 32 Iowa 376, 10 Am. Ry. Rep. 23.

The exception cannot be extended to a siding used merely for the loading of ties, wood, and piling purchased by the company (there being no testimony tending to show the amount of such business), and for the passing of trains, at a point where no depot is maintained, no employee stationed, and where persons desiring to take passage are obliged to flag the trains themselves. *Hurt v. St. Paul, M. & M. R. Co.*, 39 Minn. 485, 40 N. W. Rep. 613.

Where a switch extends along the main track through an open prairie, it is as necessary and practicable to have the road fenced as at any other point. *Russell v. Hannibal & St. J. R. Co.*, 26 Mo. App. 368.

The duty of a company to fence, under Mo. Rev. St. § 809, applies to grounds used for switching purposes, used in connection with the depot or station, if the company could maintain fences and cattle-guards without interference with its business or inconvenience to the public. *Chouteau v. Hannibal & St. J. R. Co.*, 28 Mo. App. 556.

CLEVELAND, C. C. & ST. L. RY. CO.

v.

STEPHENS.

(Supreme Court of Illinois, June 18, 1898.)

Fires Set by Engines—Contributory Negligence.*—Under the law of Illinois a person owning lands adjoining the right of way of a railroad company is under no obligation to remove combustible matter from his land in order to prevent fires from being started thereon by sparks from locomotives, his failure to do so not constituting contributory negligence.

Appeal.—Where a question as to the measure of damages is not raised in the trial court, it cannot be considered upon appeal.

APPEAL by defendant from Fourth district appellate court. *Affirmed.*

C. S. Conger, for appellant.

Bradbury & MacHatton and *Parker & Crowley*, for appellee.

*See note at end of case.

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WILKIN, J. This case was begun in the circuit court of Crawford county by appellee against appellant to recover damages alleged to have been done to his orchard, fences, grass, etc., by fire set out by the locomotive engine of defendant. The declaration is in case, containing several counts, alleging, in substance, that the plaintiff was the owner of land abutting upon the right of way of defendant; that through the carelessness and negligence of defendant its engines threw out sparks and set fire to combustible matter on the plaintiff's land, which burned and destroyed certain property owned by and belonging to plaintiff, consisting of 400 bearing trees, 17 acres of clover, 20 acres of timothy, 400 rails in fence, and 75 loads of manure spread upon the ground. Other counts alleged that defendant suffered combustible matter to accumulate on its right of way; that fires from its engines ignited this matter, and spread upon plaintiff's land, causing damage, as set forth in the preceding counts. There was a trial by jury, and verdict was rendered for plaintiff for \$1,500, upon which judgment was entered. The defendant appealed to the appellate court for the Fourth district, where the judgment of the circuit court was affirmed, and it now brings the case to this court.

The appellant recognizes the rule that all controverted questions of fact have been settled adversely to it, and relies solely upon alleged errors of law in the giving and refusing of instructions upon the trial. The court instructed the jury, at the instance of the plaintiff, that "it is no defense that plaintiff used his premises in the same manner, and used no more caution in the manner of use of his lands than he would have done if no railroad had run through such premises." It refused to give three instructions asked by the defendant, to the effect that, if the plaintiff had contributed to the injury sued for by negligently allowing dry grass to remain in his orchard, he could not recover. The giving of the foregoing instruction on behalf of the plaintiff, and the refusal of those asked by the defendant, it is

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insisted, was error. This contention is based upon the assumption that it was the duty of the plaintiff to keep his premises adjoining the right of way free from combustible matter, in order that fire which might be set out by the locomotive engines of the defendant could not spread, and that, if he failed to do so, he could not recover any damage for injury occasioned by the spreading of such fire. The position is contrary to the plain provisions of our statute. Section 1 of the act of 1869, relating to fires caused by locomotives (Rev. St. 1874, p. 814), is as follows: "That in all actions against any person or incorporated company for the recovery of damages on account of any injury to any property, whether real or personal, occasioned by fire communicated by any locomotive engine while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as full *prima facie* evidence to charge with negligence the corporation or person or persons who shall, at the time of such injury by fire, be in the use and occupation of such railroad, either as owners, lessees or mortgagees, and also those who shall at such time have the care and management of such engine; and it shall not, in any case, be considered as negligence on the part of the owner or occupant of the property injured that he has used the same in the manner, or permitted the same to be used or remain in the condition, it would have been used or remained had no railroad passed through or near the property so injured, except in cases of injury to personal property which shall be at the time upon the property occupied by such railroad." Without wholly ignoring the letter and spirit of this statute, it cannot be said that the owner of land adjacent to a railroad right of way and track is bound to keep his premises free from combustible matter in order to avoid the spread of fire negligently set by locomotive engines. Prior to the passage of this statute, it had been held by a divided court that such duty was imposed upon a property owner by the law. It was evidently the purpose of the legislature, in the passage

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of that part of the foregoing section which says, "and it shall not, in any case, be considered as negligence on the part of the owner or occupant of the property injured that he has used the same in the manner, or permitted the same to be used or remain in the condition, it would have been used or remained had no railroad passed through or near the property so injured," to change the rule theretofore announced in those cases.

The contention that the cases of *Railway Co. v. Larmon*, 67 Ill. 68, and *Railway Co. v. Maxfield*, 72 Ill. 95 (decided since the act of 1869), are to the same effect as the previous decision, is a misapprehension. In the *Larmon* Case, the court, being then authorized to review the facts, found that the railroad company had been guilty of no negligence whatever in the equipment of its engine. On the question as to whether the engineer in charge was competent, and had used proper skill and diligence in handling his engine, the evidence was conflicting, and it was held that an instruction on that branch of the case was erroneous, as making railroad companies insurers against accidents by fire. There is nothing in the decision of that case, or the one following it in 72 Ill. 95, which attempts to discuss or decide the question of contributory negligence on the part of the property holder. The language, "The party who erects his building on or near the track knows the danger incident to the use of steam as a locomotive power, and must be held to assume some of the hazard connected with its use on these great thoroughfares," was mere argument, and wholly unnecessary to the decision of the case; but it cannot be fairly contended that it means that a property owner so erecting his building assumes the hazard of the negligent or wrongful act of those using steam as a locomotive power, so that he cannot recover damages occasioned by such wrongful or negligent act. In the absence of statutory provision, the weight of authority and sound reasoning is that a person owning lands adjoining the right of way of a railroad company "has a right to presume that the company will not be guilty of negli-

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gence, and is not bound to remove dry and combustible matter from his land in anticipation of probable negligence on the part of the company. He has a right to use his property in the ordinary and usual way, and so long as he does so he will not be deemed guilty of contributory negligence." 3 Elliott, R. R. § 1238, and cases cited. It is difficult to perceive upon what principle it can be held that one cultivating land adjoining a railroad right of way is bound to be to the expense of keeping it free from dry grass, stubble, or other combustible matter. He owes no such duty to individual adjoining owners nor to the public. There can be no negligence in the failure to do that which there is no duty to do. He can only recover damages occasioned by the railroad company through its negligence. It cannot be seriously contended that he is bound to presume it will be negligent, or, even if he is, that he must abandon the ordinary use of his land, or expend labor and money to protect himself against such negligent act.

It is claimed that the true measure of plaintiff's damages is the difference in the value of the real estate before and after the fire, which was not applied to the case on the trial. That question was not raised in the circuit court, and cannot be raised here. Other errors assigned are properly disposed of by the appellate court. Its judgment will accordingly be affirmed. Judgment affirmed.

Appeal.

NOTE.

Fires Set by Engines—Combustibles Near Right of Way—Contributory Negligence.—See *Mathews v. St. Louis & S. F. R. Co.*, 61 Am. & Eng. R. Cas. 432, and *notes*, p. 459, 121 Mo. 298.

A landowner is not guilty of contributory negligence where he fails to keep his adjoining land and right of way free from combustible materials, as it is not his duty to do so. *Pittsburgh, C. & St. L. R. Co. v. Jones*, 11 Am. & Eng. R. Cas. 76, 86 Ind. 496, 44 Am. Rep. 334; *Richmond & D. R. Co. v. Medley*, 7 Am. & Eng. R. Cas. 493, 75 Va. 499; *Erd v. Chicago & N. W. R. Co.*, 41 Wis. 65.

He may cultivate, build upon, and use his lands, or leave them in a state of nature, as he may see proper, and will take upon himself

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no other risks than such as are incident to the operation of the road with proper care by the company, and will, nevertheless, be entitled to damages for injuries by fires arising from the negligence of the company in the construction or management of its locomotives, or in the condition in which its track is suffered to remain. *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 14 Am. Ry Rep. 226.

Acquisition of land for the purposes of a railroad does not embarrass the right of the owner of adjoining lands not taken, in the freest use of them in any lawful business, nor expose him to be charged with contributory negligence if his property of an inflammable nature, necessarily and carefully used in the course of such business, is set afire by sparks from a defective or unskillfully managed locomotive. *Kalbfleisch v. Long Island R. Co.*, 29 Am. & Eng. R. Cas. 179, 102 N. Y. 520, 7 N. E. Rep. 557, 2 N. Y. S. R. 473, 55 Am. Rep. 832.

Plaintiff is not bound to clear the ground around his wood pile, of combustible material. *Northern Pac. R. Co. v. Lewis*, 51 Fed. Rep. 658, 7 U. S. App. 254, 2 C. C. A. 446.

It is not necessarily contributory negligence, as a matter of law, for the plaintiff to allow dry limbs, brush, grass, and other combustible matter to accumulate on his premises adjacent to a railroad, so as to bar him of a recovery if such accumulation contributes to a fire started by the company; but whether it is contributory negligence is a question for the jury. *Bevier v. Delaware & H. Canal Co.*, 13 Hun (N. Y.) 254; *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 8 Am. & Eng. R. Cas. 717, 79 Ind. 111; *Philadelphia & R. R. Co. v. Schultz*, 2 Am. & Eng. R. Cas. 271, 93 Pa. St. 341; *Jaffrey v. Toronto, G. & B. R. Co.*, 23 U. C. C. P. 553.

In an action against a railway company for negligently allowing their land adjoining the track to remain covered with brushwood, etc., whereby cinders from the locomotive fell thereon and caused a fire, which extended to the plaintiff's land, it was shown that the railway fence in which the fire originated was a brush fence, the line having been recently built through a new country. The plaintiff had been employed by the defendants to cut down the trees on his own land within 100 feet of the centre of the track, under the C. S. C. c. 66, § 4, and he had felled them lengthwise with the track and left them there. *Held*, that under the circumstances the plaintiff was not guilty of contributory negligence in having left the trees felled by him on his own land. *Holmes v. Midland R. Co.*, 35 U. C. Q. B. 253.

The owner of land through which a railroad runs is not under any obligation to keep the grass cut on the right of way, nor to remove dry grass and other combustibles from the right of way or from his adjoining land. *Pittsburg, C. & St. L. R. Co. v. Jones*, 11 Am. & Eng. R. Cas. 76, 86 Ind. 496, 44 Am. Rep. 334; *Patton v. St. Louis & S. F. R. Co.*, 23 Am. & Eng. R. Cas. 364, 87 Mo. 117; *Houston & T. C. R. Co. v. McDonough*, 1 Tex. App. (Civ. Cas.) 354.

Where a landowner stacks hay near a railroad track it is not contributory negligence for him to fail to burn the grass from the land between the hay and the track. *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 21 N. E. Rep. 753.

Where a fire is started on a company's right of way, and is driven by a high wind across an intervening farm before it reaches plain-

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tiff's, he is not prevented from recovering by having suffered dry grass and other combustible matter to remain on his land. *Palmer v. Missouri Pac. R. Co.*, 76 Mo. 217.,

Persons occupying farms along railroads are entitled to cultivate and use them in the manner customary among farmers, and may recover for damages caused by fire resulting from the negligence of a railway company, although they have not plowed the dry grown grass, or taken other like unusual means to guard against such negligence. *Snyder v. Pittsburg, C. & St. L. R. Co.*, 11 W. Va. 14, 18 Am. Ry. Rep. 154.

To permit dry grass and stubble to accumulate on plaintiff's land, or on land between his and a railroad, is not negligence *per se*. *Louisville, N. A. & C. R. Co. v. Krinning*, 87 Ind. 351; *Chicago, St. L. & P. R. Co. v. Burger*, 124 Ind. 275, 24 N. E. Rep. 981; *Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14.

Persons occupying farms along a railroad may cultivate and use them in the manner customary among farmers, and may recover for damages by fire resulting from the negligence of the railway company, although they have not plowed up stubble or taken other like unusual means to guard against the negligence of the company. *Houston & T. C. R. Co. v. McDonough*, 1 Tex. App. (Civ. Cas.) 354. *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223, 2 Am. Ry. Rep. 483.

A person owning land contiguous to a railroad is not obliged to keep the leaves falling from his trees from being carried by the wind to such railroad, nor to keep his lands clear of leaves and combustible matter; nor, on failure to perform such acts, does he become contributory to the production of a fire originating in the carelessness, on its own land, of the railroad company. *Salmon v. Delaware, L. & W. R. Co.*, 38 N. J. L. 5, 39 N. J. L. 299, 13 Am. Ry. Rep. 14.

The fact that plaintiff allowed refuse combustible material to accumulate around his saw mill in near proximity to a logging railroad is not contributory negligence. He had a right to use such material to fill up waste and low places about the mill, just as he was accustomed to do before the railroad was built. *Kendrick v. Towle*, 60 Mich. 363, 1 Am. St. Rep. 526, 27 N. W. Rep. 567.

The owner of land adjacent to a railroad track having stacks of straw and oats upon his premises is not guilty of contributory negligence because he permits grass to grow up around the stacks, which may, when dry, communicate fire. *Gulf, C. & S. F. R. Co. v. Fields*, 2 Tex. App. (Civ. Cas.) 700.

A farmer is not guilty of negligence in stacking wheat in a field abutting on a railroad, and leaving the stubble on the ground, where it is destroyed by fire, communicated from a passing engine to dry grass on the right of way, and thence through the stubble to the wheat. *Bass v. Chicago, B. & Q. R. Co.*, 28 Ill. 9.

Plaintiff piled his wood near a railroad, and cleared the brush and other combustible material away between his wood and the track. Sparks from a locomotive set fire to dead grass along the track, and burned beyond plaintiff's wood, and then back to it through underbrush. *Held*, that the plaintiff was not guilty of contributory negligence in not clearing the grounds back of the wood. *Northern Pac. R. Co. v. Lewis*, 56 Am. & Eng. R. Cas. 86, 7 U. S. App. 254, 51 Fed. Rep. 658, 2 C. C. A. 446.

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The abutting landowner has an equal duty with the company to keep combustibles, such as dry grass, etc., cleared away from his lands adjoining a right of way. *Ohio & M. R. Co. v. Shanefelt*, 47 Ill. 497; *Coates v. Missouri, K. & T. R. Co.*, 61 Mo. 38, 8 Am. Ry. Rep. 60.

See also, *Collins v. N. Y. C. & H. R. R. Co.*, 5 Hun (N. Y.) 499.

DEWEY

v.

CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Wisconsin, May 3, 1898.*)

Horses Frightened by Cars*—Nonsuit—Appeal.—Where the trial court decides there is no evidence to warrant a verdict in plaintiff's favor, and grants a nonsuit or directs a verdict accordingly, the decision will not be disturbed on appeal unless it clearly appears by the record to be wrong.

Same—Damnum Absque Injuria.—Injuries resulting from the frightening of a horse by the appearance of moving railway cars, trains or locomotives, or the usual noises or incidents of their ordinary operation, are *damnum absque injuria*.

(Syllabus by the Judge.)

APPEAL by plaintiff from Columbia county circuit court. *Affirmed.*

Action to recover for personal injuries. The complaint states that as plaintiff was traveling on Adams street in the city of Portage, in a buggy drawn by a single horse, approaching defendant's railway track at a point where it intersects or crosses such street, one of defendant's locomotives, in charge of its servants, passed over the crossing, and after going a short distance beyond it, was brought to a stop; that just as the horse was about to cross the railway track, proceeding quietly and under full control of the driver, the engine being about 30 feet away, defendant's servants, without any warning, carelessly

Case Stated.

*As to Frightening Horses, see *Weil v. St. Louis S. W. Ry. Co.*, 9 Am. & Eng. R. Cas., N. S., 721, and *note*, p. 724.

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started such engine, causing it suddenly to exhaust steam with a loud noise, and to emit a great volume of smoke and cinders, whereby the horse was frightened, became unmanageable, and suddenly turned and overturned the buggy, causing the injuries complained of. The complaint further states that defendant had a flagman at the crossing, but that he negligently permitted the driver of the horse to approach the place of danger without any warning to him or plaintiff, and that defendant's servants in charge of the engine knew of the situation of the horse at the time they started it. The evidence tended to show that the engine was moving away from the crossing when the accident happened; that it passed over the crossing as the horse approached, and stopped for a legitimate purpose; that it was started up slowly and without any unusual noise; that smoke and steam, naturally emitted by the operation of starting the engine, was carried by the wind towards the horse, causing him to become suddenly uncontrollable, and to turn and overturn the buggy, injuring plaintiff as alleged. At the close of the evidence a nonsuit was granted on defendant's motion. Judgment was rendered accordingly in defendant's favor and plaintiff appealed.

Fowler & McNamara, for appellant.

Burton Hanson, R. M. La Follette, and J. B. Taylor, for respondent.

MARSHALL, J. (after stating the facts). This case is ruled by the well-settled principle that where the trial court decides that there is no evidence which will support a verdict in plaintiff's favor, and grants a nonsuit or directs a verdict accordingly, the decision cannot be disturbed on appeal unless the record shows that it was clearly wrong. *Powell v. Steel Co.* (Wis.) 73 N. W. 573.

Horses Frightened
by Cars—Non-
suit—Appeal.

It appears that the way on which plaintiff was driving when injured was clear as the horse approached the railway track; that the engine was in plain sight some

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distance from the line of travel, and was about to move westward, away from the crossing, to the knowledge of the driver of the horse. Such being the case there was no occasion for any warning being given by the flagman. Whatever danger existed was as well known to the driver and to plaintiff as to the flagman. Moreover, the danger, of which it was the flagman's duty to warn travelers about to cross the railway track, *i. e.* that trains, locomotives or cars were about to pass, did not exist at all. The driver testified that when the engine started, it made a slight exhaust or puff, that steam and smoke escaped, but that there was nothing unusual as to noise, smoke or steam; that there was a strong wind blowing which carried the steam and smoke directly towards the horse, whereby it was frightened and caused to make the movement which threw plaintiff to the ground and injured him; that witness was uncertain just what sound was made, or whether steam came from the cylinder cocks, but said he did not think anything unusual occurred. Another witness testified that she observed the engine at the instant of the accident; that she saw steam escaping from the lower part of the engine in front, and that it made a pretty loud noise. Plaintiff testified that steam escaped from the engine back of the cowcatcher with a loud noise; that the wind was blowing very hard from the west. From this, at most, it appears that the engine was started in the ordinary way, and that the exhaust of steam was either into the smoke-stack or through the cylinder cocks, in either case nothing out of the ordinary way of operating a locomotive under the circumstances. In this we are unable to see any evidence of negligence on the part of defendant's servants. They had a right to move the engine in pursuit of defendant's business in which they were engaged, and without responsibility on defendant's part for the consequences of any of the ordinary noises which the operation of the engine caused, or such incidents as the ordinary escape of smoke and steam. If such were not the case, railway companies would be greatly embarrassed in the performance of

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the duties they owe to the public. There appears to have been an utter failure to show any excessive or unreasonable blowing off of steam, or any unusual noise, or anything not ordinarily attendant upon the usual movements of a locomotive. That where injuries result from the frightening of horses by the sight of moving cars, trains or locomotives, or the usual noises or incidents of their ordinary operation, there is no liability on the part of the railway company is firmly established and recognized as the law. *Abbot v. Kalbus*, 74 Wis. 504, 43 N. W. 367; *Cahoon v. Railway Co.*, 85 Wis. 570, 55 N. W. 900; *Flaherty v. Harrison* (Wis.) 74 N. W. 360; *Elliott, R. R.* § 1264, and numerous cases cited.

The judgment is affirmed.

EVANSVILLE & T. H. R. Co.

v.

STATE *ex rel.* TOWN OF FT. BRANCH.

(*Supreme Court of Indiana, Jan. 13, 1898.*)

Street Crossings—Duty of Railroad Companies.—The failure of a municipal corporation to pass an ordinance fixing the grade of its streets, does not relieve a railroad company from the duty of properly constructing crossings over its tracks where they intersect the streets of the town.

Same.*—And such is its duty whether the streets were laid out and opened before or after the railroads were built.

Action to Enforce Public Rights—Complaint.—And in an action to compel a railroad company to construct such crossings, the complaint, if it alleges a refusal on the part of the company to perform such duty, need not allege a demand of performance by relator.

Same—Burden of Proof.—The complaint alleged that the company built, operated and maintained their road across two streets known by certain names. *Held*, that it was not incumbent on relator, under such allegations, to prove, nor on the court to find, that such streets, or either of them, were highways, nor when nor how they were dedicated.

Dedication by Implication*—Lapse of Time.—A railroad company's intention to dedicate to the public use a strip across its right of way

*See notes at end of case.

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as a continuation of a public street was sufficiently shown by its conduct in grading and planking its tracks at such point, and thereby making it a safe and convenient crossing for the public; and by consenting to such strip being used as a public highway during six or seven years; and the public showed its acceptance of it as such by building an approach to and keeping such strip in repair during the same period of time; and the public's right to use such strip could not be divested by the subsequent act of the company in tearing up the planking at such crossing.

APPEAL by respondent from Gibson county circuit court. *Affirmed.*

Iglehart & Taylor, for appellant.

Medcalf & Stillwell, for appellee.

MONKS, J. This was an action by appellee to compel appellant, by writ of mandamus, to construct a suitable and safe crossing over its tracks at the crossing of two streets in the town of Ft. Branch.

Case Stated.

Appellant appeared, and filed a general denial to the complaint for the alternative writ. No alternative writ was issued. The court, at the request of appellant, made a special finding of the facts, and stated conclusions of law thereon, and, over a motion in arrest of judgment and a motion by appellant for judgment in its favor, rendered judgment in favor of the appellee, and ordered a peremptory writ of mandate as to one of said streets. The errors assigned call in question the sufficiency of the complaint, and the action of the court in overruling appellant's motion for a judgment in its favor.

The first objection urged to the complaint is that it required the court to perform a legislative act, and enact an ordinance in behalf of appellee. It is not alleged that the relator ever adopted any ordinance in regard to said crossings. In such case, the rights of the relator are the same as those of a township trustee in regard to highways. The relator had the right to enact an ordinance for the improvement of its streets, and fix the grade of the same; but the failure to do so did not relieve appellant of its duty to properly construct the

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crossings over its tracks where the same crossed the streets of said town. *Indianapolis & C. R. Co. v. State*, 37 Ind. 489, 502, 504. This duty is imposed by statute in this state, and also exists independent of any statute. Fifth clause of section 5153, Burns' Rev. St. 1894 (section 3903, Rev. St. 1881); 3 Elliott, R. R. §§ 1092, 1102, and cases cited; *Indianapolis & C. R. Co. v. State*, *supra*; *Railway Co. v. Smith*, 91 Ind. 119; *Railroad Co. v. Carvener*, 113 Ind. 51, 14 N. E. 738; *Cummins v. Railroad Co.*, 115 Ind. 417, 18 N. E. 6; *Railway Co. v. McIntosh*, 140 Ind. 269, 38 N. E. 476; *Railroad Co. v. Cluggish*, 143 Ind. 347, 351, 42 N. E. 743; *Railroad Co. v. Claire*, 6 Ind. App. 390, 394, 33 N. E. 918; *Egbert v. Railway Co.*, 6 Ind. App. 350, 33 N. E. 659; 4 Am. & Eng. Enc. Law, 907, 908. This duty of railroad companies is the same whether the highway was laid out and opened before or after the railroad was built. *Railway Co. v. Smith*, *supra*; *Railroad Co. v. Cluggish*, 143 Ind. 347, 42 N. E. 743; *Egbert v. Railway Co.*, 6 Ind. App. 353, 33 N. E. 659.

Same.

The next objection is that the complaint fails to allege a demand on the part of the relator that appellant construct said crossings. The refusal of appellant to construct said crossings is alleged in this complaint, and, even if the demand was necessary, as insisted by appellant, which we do not decide, the same was unnecessary after such refusal. In *State v. Board of Com'rs of Tippecanoe Co.*, 45 Ind. 501, the court, on page 503, said: "In order to lay the foundation for issuing the writ, there must have been a refusal to do that which it is the object of the writ to enforce, either in direct terms, or by circumstances distinctly showing an intention in the party not to do the act." The same doctrine is declared in *Lake Erie & W. R. Co. v. State*, 139 Ind. 158, 160, 38 N. E. 596. It is clear that the objections urged to the complaint are not tenable.

It is insisted by appellant that the court erred in overruling its motion for a judgment in its favor

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on the facts found, because it is alleged in the complaint that appellant's road was constructed over the streets named, and the facts found are that, when said road was constructed, said streets were not laid out, platted, or used as streets, and that, for all that appears, said railroad was constructed before the town of Ft. Branch was known. It is alleged in the amended complaint, in substance, that appellant built, operated, and maintained its tracks, side tracks, and switches along and across the streets known as "Walnut Street" and "Williams Street." Under such allegations, it was sufficient to prove that said appellant either built or operated and maintained its tracks across said streets, or either of them. It was not necessary to prove, or for the court to find, that said streets, or either of them, were public highways, and that said railroad track was built on and across the same. It is not material whether said streets, or either of them, became such before or after the railroad was built. Neither is it material how the same became streets, whether by dedication or otherwise, or whether before or after the town of Ft. Branch was incorporated. If said streets, or either of them, or any part thereof, were dedicated to the public use before the town of Ft. Branch was known, or before it was incorporated, no change in the form of government or its territorial boundaries would defeat such dedication. Elliott, Roads & S. 88.

Same—Burden of Proof.

It is next insisted by appellant that the motion for a judgment in its favor should have been sustained, because the special finding does not show any public highway across its right of way at the points alleged in the complaint, either by dedication or otherwise. The part of the finding concerning said street is as follows: "Prior to the year of 1890, the lands on the east and west side of said railway, and adjacent thereto and extending several blocks east and west, were platted and laid off into town lots, as a part of said town, and both Wal-

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nut and Williams streets were designated by the owners of the land as streets of said town, of the width of forty feet, and by said plats shown to extend east from the east line of appellant's right of way, and west from the west line of appellant's right of way. That about the years 1881 and 1882, the supervisor of highways, acting under instructions from the township trustee, graded Walnut street to the east side of the railroad track, and built an approach over a ditch to said track, and about the same time the railroad company graded and planked their three tracks at said crossing, and the work then done made a safe and convenient crossing for horses, vehicles, and footmen along Walnut street, and across appellant's tracks. Said crossing was kept in repair and used by the public as a public highway for a period of six or seven years. That said use of Walnut street and crossing of appellant's track was extensive, being used by farmers in hauling wheat to an elevator situate on appellant's tracks immediately south of said crossing, and others, both on foot and in vehicles. That said use was with the consent of appellant, and continued for such a length of time that public accommodation and private rights might be materially affected by an interruption of the right to so use such street and crossing. That in the year 1888 appellant tore up and took away the approach built by the supervisor, took out the planking between the tracks, and built another switch across said street, and since that time said crossing has not been used by the public, and is not safe or convenient to use as a crossing." The intent of the owner to devote his land to a public use is an essential element of dedication, and without it there can be no valid dedication. *Bidinger v. Bishop*, 76 Ind. 244. Such intention may be implied from the declarations, acts, or conduct of the land owner. When the acts and conduct of the land owner are such as fairly and naturally lead to the conclusion that he intended to dedicate the land to the public use, and others have in good faith acted upon such acts and conduct, the fact that the land-

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owner may have had a different intention from the one manifested is of no consequence. Such secret intention cannot prevail against his conduct and acts, upon which the public have relied. *Railway Co. v. Noftsgger* (this term) 47 N. E. 332; *Lake Erie & W. R. Co. v. Town of Boswell*, 137 Ind. 336, 343, 36 N. E. 1103; *City of Indianapolis v. Kingsbury*, 101 Ind. 200, 213-215; *Faust v. City of Huntington*, 91 Ind. 493-496; *Elliott, Roads & S.* 92, 96. An implied dedication arises, by operation of law, from the acts of the owner. *Town of Marion v. Skillman*, 127 Ind. 130, 136, 26 N. E. 676. When such dedication is accepted by the public, it becomes irrevocable. *City of Indianapolis v. Kingsbury*, 101 Ind. 213; *Faust v. City of Huntington*, 91 Ind. 494; *Washb. Easem.* p. 139, § 21; *Elliott, Roads & S.* 119. The intention of appellant to dedicate to the public use a strip across its right of way, as a continuation of Walnut street, is clearly and unequivocally manifested by its conduct in grading and planking its three tracks at said crossing, thus, with the work done by the road supervisor, making a safe and convenient crossing over said tracks for public travel, and by consenting to said strip being used and worked as a public highway for a period of six or seven years; and the public by grading Walnut street to the east side of the track, and building an approach to said track over a ditch, and keeping said crossing in repair, and using the same as a public highway for said period, accepted said dedication. The public, by building said approach, and keeping said strip in repair, as a part of Walnut street, as a public highway, for the period of six years, acquired such rights as could not be divested by the act of appellant in tearing up said planking in 1888. *Washb. Easem.* p. 139, § 19; *Town of Marion v. Skillman*, 127 Ind. 136, 26 N. E. 676; *City of Indianapolis v. Kingsbury*, 101 Ind. 213-215; *Faust v. City of Huntington*, *supra*. If dedication may be regarded as an ultimate fact, yet, as the facts found admit of but one conclusion,—that of dedication by appellant,—the finding of such ultimate fact was unnecessary. This

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court, however, in *City of Indianapolis v. Kingsbury*, 101 Ind. 222, speaking of a finding of dedication, said: "Much stress is placed upon a statement contained in one of the specifications of the special finding, that the street south of Market street was never dedicated to the public; but this is a mere conclusion of law, improperly blended with matters of fact, and cannot govern the facts. Courts always act upon facts found and never upon mere conclusions of law wrongly cast into a special finding." It follows that the court did not err in overruling said motion.

What we have already said disposes of the exceptions to the conclusions of law. Besides, the court stated two conclusions of law,—the first, as to Williams street, in favor of appellant; the second, as to Walnut street, in favor of appellee. Appellant excepted to them jointly, and not severally, and it is well settled that, if either one is good, the exception must fail. *Royse v. Bourne* (last term) 47 N. E. 827; *Clause Printing-Press Co. v. Chicago Trust & Sav. Bank*, 145 Ind. 682, 688, 689, 44 N. E. 256; *Saunders v. Montgomery*, 143 Ind. 185, 41 N. E. 453.

No objection is pointed out to the first conclusion, and we think it is correct. The first conclusion being correct, under the rule stated, appellant's exceptions to both conclusions must fail. Judgment affirmed.

NOTES.

Authority to Impose on Railroad the Duty to Make Bridges and Crossings over New Streets and Highways.—The provisions of R. S., c. 18, § 27, requiring that the expense of building and maintaining so much of a town way or highway as is within the limits of the railroad, where such way crosses a track at grade, shall be borne by the railroad company, are constitutional.

Those provisions are applicable to a company though its charter provides that it is not to be altered, amended, or repealed, and they do not impair the obligation of any contract with such company.

The power of the legislature to impose such burdens for the general safety is fundamental. It is the police power, which must be sufficiently extensive to protect all persons and property. *Boston and Maine R. Co. v. County Commissioners*, 79 Me., 363, 32 Am. & Eng. R. Cas. 271.

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All of the authorities are not in accord with the foregoing case upon this question. In *Illinois Cent. R. Co. v. City of Bloomington*, 76 Ill. 447, long after the construction of a railroad a street was extended so as to cross the same, and the city passed an ordinance requiring the railway company to make a safe and proper crossing by grading the approaches of the street at the crossing, there being nothing in the charter of the company imposing such duty, or any such duty imposed by any general law in force at the time the company was created. *Held*, that the company was not liable to this new burden any further than might have been required of an individual, and that as the whole burden was sought to be placed upon the company without regard to benefits, the ordinance was in violation of the constitution, and could not create any liability upon the company, and that the legislature itself could not impose such burden without making compensation.

The court said: "Suppose a natural person had the right of way across his neighbor's grounds, and afterward the city were to locate and open a street across his right of way, does any one suppose the owner of the right of way could be compelled, by legislative enactment, or an ordinance in pursuance thereto, to construct the crossing of the street at his own expense, even if his use of the right of way would render the use of the street impracticable or dangerous until the approaches could be constructed? We presume no one would contend for the power in that case. And why? Because it would impose an unequal and unjust public burden on the owner of the right of way; that, in spirit, would be the taking of private property for public use, without just compensation, which must be paid under the constitution.

"If, then, such burdens cannot be imposed upon a natural person, why, or by what reasonable means, can it be required of an artificial person? When brought into existence, these bodies are created persons so far as to become amenable to the same burdens in the support of the government, by taxes and the like, as natural persons coming into and subject to the government. But they are only liable to the performance of such duties to the same extent, on the same terms and conditions as natural persons. The legislature can exact of them no greater or higher duties than it can of natural persons, unless the right is reserved in their charters, or by some law that enters into their charters. One of the fundamental principles upon which all good government is constructed and is administered, is equality of burdens and protection. Any other principle is unjust and oppressive." See, also, *Morris Canal Co. v. State*, 24 N. G. L. 62.

This question arose in New York in the case of *Miller v. N. Y. & Lake Erie R. Co.*, 21 Barb. (N. Y.) 513, where it was held that the legislature could not under the usual reservation to the legislature in the charter of a railroad company of the power to alter, modify, or repeal it, pass a subsequent act requiring the railroad company to cause a proposed new street or highway, laid out by the commissioner of highways, to be taken across their track, and to cause all necessary embankments, excavations and other work to be done on their road for that purpose at their own expense. This decision, however, was overruled when the question came before the court of appeals in *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345, where the court said: "Nor is there anything unlawful in obliging the

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railroad company to make the necessary excavations or embankments for taking the highway across the railroad. The disturbance of the surface of the ground, which has rendered such work necessary, was effected by the railroad itself; and the reservation of legislative authority we may suppose to have been inserted for the purpose of obliging the companies to conform to such directions as subsequent legislatures should discover to be necessary for the public good, or which should be required by public policy. The difficulties which arose out of the rule that the grant of corporate power for individual emolument created a contract between the corporators and the State, led to the reservation referred to; and this case presents a strong illustration of the wisdom of the legislative policy.

The case of *Miller v. the New York & Erie R. Co.* (21 Barb. 513) was adjudged in hostility to these principles, and I think it cannot be sustained."

Dedication of Land for Highway.—See *City of Chicago v. Chicago, Rock Island & Pacific Ry. Co. et al.*, 1 Am. & Eng. R. Cas., N. S., 1, and *note p. 12, et seq.*

BERGEN COUNTY TRACTION CO.

v.

HEITMAN'S ADM'R.

(*Court of Errors and Appeals of New Jersey, June 21, 1898.*)

Injury to Child on Street Railway Track—Negligence.*—That a child two years and three months old, to whom contributory negligence cannot be imputed, was suffered to roam unattended in the public street, cannot relieve a traction company from liability for its negligence in the management of its car, resulting in the child's death.

Same—Duty of Motormen.*—A motorman in charge of an electric traction car moving in the public streets, where he has reason to expect little children are playing, must exercise a high degree of watchfulness in the operation of his car.

(Syllabus by the Court.)

ERROR by defendant to supreme court. *Affirmed.*

Thomas B. Harned, for plaintiff in error.

John P. Stockton Jr. and *Warren Dixon*, for defendant in error.

*See *Dan v. Citizens' St. R. Co.* (Tenn.), 10 Am. & Eng. R. Cas., N. S., 880, and *note*.

See *Moss et ux. v. Philadelphia Traction Co.* (Pa.), 6 Am. & Eng. R. Cas., N. S., 690, and *note*, p. 692.

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VREDENBURGH, J. The plaintiff's administrator obtained a verdict and judgment on the trial of this cause before the supreme court circuit of Bergen county, against the traction company, for \$1,000 damages, for causing the death of the plaintiff, a child of about two years and three months of age who was run over by the company's car in the public highway. The question to which we are confined by the assignments of error upon the record is whether the trial court should have nonsuited the plaintiff, or, at the close of the evidence, have directed a verdict for the defendant. The age of the child excludes from the case the question of the contributory negligence of the deceased, as affecting the right of recovery; and the fact that an infant of such tender years was suffered to run in the public street unattended, and away from the custody or control of any guardian or caretaker, cannot excuse the company from liability for its negligence. This principle was decided in this state by the supreme court in the case of *Newman v. Railroad Co.*, 52 N. J. Law, 446, 19 Atl. 1102. The court below left the question of the defendant's responsibility for the accident to the jury, upon the controlling point of the case, under the following instruction, viz: "If the evidence satisfies you that the motorman was running at an undue rate of speed, or failing to keep such a lookout as reasonable care required, and that the accident was occasioned by the cause, why, then, you will find your verdict for the plaintiff. If the evidence does not satisfy you upon that point, you will find your verdict for the defendant." Irrespective of the high rate of speed at which the plaintiff claimed that the circumstances showed the car was running at the time of the accident there was sufficient evidence to go to the jury as to the motorman's negligence in failing to observe the children in the immediate front of his car until after he was warned by the shouting of a passenger sitting behind him in the car. The defendant's own witness, Henry Hodges (a car conductor in the employ of the company, but riding

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as a passenger that day) swears he saw, from his seat on the right side of the car, three children in front of the car, not two feet from the rail, and next to some bushes growing on that side of the car; that he (to use his own words) "halloed at the motorman, and got off his seat, and he [the motorman] put the brake on and reversed the current, and it knocked me right back in my seat." I quote more fully from his testimony, as follows: "When the motorman got around the curve, and got towards where these bushes were, I saw three children. I got up and halloed at the motorman. One of them came back, like as if something had made him scared at something. I could not tell what it was. He turned back, and ran right into the car. The other two ran away,—ran towards the house." The motorman who had charge of the car testified on the point relating to the stopping of the car in these words: "When first I seen the children, I put on the brake and reversed the car." So that it follows that he, though standing, did not see the children until after the passenger sitting behind him had seen them, and had had time to halloo at the motorman, and time to rise from his seat, into which he was afterwards knocked back by the reversal of the motion of the car when the electric current was reversed and the brake put on. Here was the lapse of precious moments of time before the motorman saw the children,—on the assumption, of course, that he tells the exact truth in stating that he reversed the current when he first saw the children. If he had been properly vigilant, standing at the front of the car, and looking in the direction of the track before him, he would have been able to have reversed the current at the very instant the children came in view around the curve, and before a passenger had aroused him by shouting from the car at him. There was some evidence also tending to show that the motorman should have expected to meet children at the place of the accident. Upon his cross-examination he admitted that "he did not know whether he did, or not, testify before the coroner's jury that he was expecting

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to find children at that location,"—opposite some dwelling houses,—and he admitted that he had seen children there on previous occasions. He also testified that "he had got the car under the full current when he reached those bushes." This was just before the child was killed. These were questions of fact (of the truth of which the jury were the only proper judges), going to show the motorman's want of vigilance and care in the management of his car on this occasion. The fact that his car had just rounded a curve in the road, opposite dwellings, where he had previously seen children playing in the road, and where bushes growing near the track tended to obstruct his view, in and of itself, called for the exercise of a greater degree of watchfulness before he turned on the full force of his motor in order to increase his speed.

In this class of casualties, involving injuries by the cars of electric traction companies, going often with great rapidity in the public highways, motormen are properly held to a careful and constant lookout for every movement of human life on their front, and especially for the movements of children who are of such tender years as to be deemed incapable of contributory negligence. Children of the age of this child, and even of greater age, are regarded by approved judicial decisions as incapable of committing contributory negligence. It is unnecessary to refer to these authorities, because no exact rule in this respect is established. The Pennsylvania supreme court has had occasion to decide many of such cases, and of these I have selected the following, to show the degree of watchfulness required by the decisions of these courts in the management of such cars, under closely similar conditions. In the case of *Woekner v. Motor Co.* (Pa. Sup.) 35 Atl. 182, where the child injured was three years and ten months old, the motorman was careful to bring his car almost to a stop, and, when he saw the child turn from the track, released his brake, "taking it for granted," as he testified, that the child could safely get away from the track; but the

Same—Duty of
Motormen.

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court held that whether he took too much for granted, or not, was for the jury. In the case of *Schnur v. Traction Co.* (Pa. Sup.) 25 Atl. 650, the material facts corresponded very closely to those of the case at bar. The child injured was less than six years of age, and there was evidence that other persons saw the child in front when the car was two lengths and a half away, and that the gripman was standing on the side of the car, looking towards the houses he was passing, and, when hallooed to by persons who saw the child, he paid no attention to the warning. In the last respect it differs from the case at bar. The court, in sustaining the judgment below against the company, said that the gripman "should keep his eye constantly on the track before him." Without intending to approve this expression as a correct rule in all respects, it is evident that, if the motorman in the present case had exercised even a reasonable degree of vigilance in the direction his car was moving, he would have seen the children on the side of the rail, either before, or certainly as soon as, the passenger behind him saw them. The gain of this instant of time by the earlier discovery by the motorman of the presence of the children in front, and his prompt action, might have saved the child's life,—at least, it is impossible for this court to say it would not; and this was a proper question for the jury to determine from all the evidence. The case of *Pletcher v. Traction Co.* (Pa. Sup.) 39 Atl. 837, brought for injury to a child under somewhat similar conditions, holding that, where the negligence of the motorman is not the immediate or proximate cause of the injury, the question is for the court and not one for a jury, is readily distinguishable from the case in hand. There the child ran suddenly from the sidewalk to the track, and, after halting on it an instant, was struck by the car. The appellate court, in sustaining the action of the court below, ordering the plaintiff to be nonsuited, said: "That the car by which the plaintiff's son was killed was running at a high and possibly negligent rate of speed may, for the present, be conceded; but unless this was the proximate cause of

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the accident, or was a material factor in it, the defendant is not liable. The boy darted in front of the car when it was so close upon him that, stopping as he did, it was inevitable that he should be struck. For all we can see, it would have occurred had the car been running at an entirely safe and proper rate." In the case at bar, whatever may have been the rate of speed of the car, and whether or not that was a proximate cause of the accident, or whether or not the accident would have occurred if the car had been going at a moderate and proper speed, yet it seems by no means certain that, if the motorman had been looking in the direction he was moving he would not have observed the children as quickly, at least, as did the passenger behind him, and in time to avoid the accident. This was for the jury to determine. This view of the case renders it unnecessary to compare or reconcile it with the ruling in that of *Moss v. Traction Co.* (Pa. Sup.) 36 Atl. 865, cited in the brief of plaintiff in error, and in which the evidence of the motorman's alleged negligence, resulting in the death of a child three years and eight months old, consisted only in the claimed undue rate of speed of the car; the court holding that "indefinite statements" that the car was going "unusually fast" were insufficient to establish negligence in that regard. I think the judgment below should be affirmed.

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v.

JOHNSON *et al.**(Supreme Court of Texas, March 21, 1898.)*

Accident at Crossing—Disability During Minority—Damages.*—
In an action in behalf of a minor against a railroad to recover for personal injuries, it was error to instruct that the impairment of

*See note at end of case.

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his earning capacity during his minority could be considered by the jury in assessing damages, it having appeared from the evidence that his mother was entitled to his services.

Same—Joint Action by Parent and Minor Son.—Where such action and an action by his mother for the same injury were consolidated and tried together, it must affirmatively appear that such erroneous charge did not lead the jury to give compensation to each of them for the disability during the son's minority.

Instructions not Warranted by Evidence.—Where there was no evidence that those in charge of defendant's train saw the boy before the accident, it was error to instruct in regard to what would have been their duty had they seen him in a place of danger before the accident.

Reversal.—The right of the mother to recover depends upon the right of the plaintiff to recover in the action in behalf of the son.

Remarks by the Court as Error.—A remark by the court in stating the issues presented by the pleadings to the effect that defendant's employees were incompetent and careless was, not reversible error in such action, though there was no evidence to justify such remark.

ERROR by defendant to court of civil appeals of Third supreme judicial district. *Reversed.*

J. W. Terry and Chas. K. Lee, for plaintiff in error.

Moffett & Anderson and Monteith & Furman, for defendants in error.

BROWN, J. On the 20th day of June, 1895, Alice Johnson filed a petition in the district court of Bell county against the Gulf, Colorado & Santa Fe Railway

Company, in which she sought to recover of the railroad company damages for injuries alleged to have been inflicted upon her minor son, Rogers Johnson, who was alleged to have been six years old when injured. It was alleged that by reason of the injuries the son lost one foot, which disabled him for labor. The petition set up the particular acts of negligence which caused the injury in the following language: "That the car of defendant which caused the said injury had been backed with great rapidity by the defendant's engine, and was then cut loose from the engine without any person to control the same, and was run into the said crossing with great force and rapidity, without any kind of warning whatever, either by ringing a bell, sounding a whistle, or otherwise; that the employees of the defendant who were operating said

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engine and cars were wholly inexperienced; that they were without skill; that they were careless and negligent, and were known to defendant, its officers and agents, to be such at the time and prior to the time when the said accident occurred." The injury was alleged to have occurred at a crossing on the defendant's railroad in the town of Temple. On the same day Alice Johnson, as next friend of Rogers Johnson, her minor son, filed a petition in the same court, seeking to recover against the defendant, on behalf of the minor, damages for the same injury, and in that petition the allegations of negligence were practically the same as in the petition in the suit of Alice Johnson in her own right. At the suggestion of the defendant the two suits were consolidated and tried together. Verdict and judgment were rendered in favor of Alice Johnson for \$2,000 and in favor of Rogers Johnson for \$5,000, which, upon appeal, were affirmed by the court of civil appeals for the Third supreme judicial district.

As a guide in determining the amount of the verdict for Rogers Johnson, the trial judge gave the following charge to the jury: "If you find for plaintiff Rogers Johnson, say so by your verdict, and assess his damages at such an amount as the proof shows he sustained: and you are authorized to take into consideration such mental and physical pain and suffering, and the nature, extent, and probable duration of the injury, and his impaired condition or capacity to earn money or pursue an occupation." The proof showed that Rogers Johnson, at the time of the injury, was 10 years old. The charge authorized the jury to find in his favor damages that might accrue from his impaired condition or capacity to earn money or pursue an occupation, from the date of his injury; that is, during his minority as well as thereafter. This was clearly erroneous, for the minor had no right to such recovery, as the evidence showed that he had a mother then living, under whose control he was. The charge being erroneous, it is presumed to

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have been injurious to the interests of the defendant, and "in such case the duty does not devolve upon the party complaining to show that he was thereby injured, but upon him in whose favor the verdict was returned to show that the complaining party was not prejudiced by the error." *Railway Co. v. Greenlee*, 62 Tex. 349; *Emerson v. Mills*, 83 Tex. 388, 18 S. W. 806.

The trial court also gave the following charge upon the measure of damages in the case of Alice Johnson: "But, if you should find that the son was injured as alleged, and by and on account of the negligence of the defendant's employees as alleged in her petition, without any contributory negligence either on her part or that of her said son, then you will find in her favor, and assess her damages simply at the value of the services of the boy to her from the time of his injuries to the time he shall have arrived at the age of 21 years; and in making this estimate you must be governed by the testimony and your own judgment, common sense, and discretion. If you find for defendant, say so by your verdict." The court of civil appeals, in passing upon the error assigned on the first charge quoted, says: "We must assume that the jury who tried this case were men of ordinary intelligence, and, such being the case, we must impute to them ordinary ability of discrimination. The court, in effect, tells the jury that during the period of minority of Rogers Johnson his mother was entitled to the value of his services, and when they were authorized to consider his impaired condition and capacity to earn a living on that branch of the case wherein his mother sought to recover damages for him the jury must have understood, as men of ordinary intelligence, that the impaired capacity to pursue an occupation or to earn a living did not embrace the period of time which they were just told the mother in her own right could recover for." If we admit the soundness of this position, it affords no certain ground upon which to base the conclusion that the jury did not in fact allow to Rogers Johnson compensation for

his inability to labor and to pursue any occupation during his minority. It is not enough that the records show that the jury ought not to have allowed compensation to both mother and son for the same time, or that they might not have done so; but it must appear affirmatively that the erroneous charge did not lead the jury to give compensation to each of them for the disability during minority. In order to reach the conclusion with any degree of certainty that the jury did not follow the erroneous charge of the court in assessing the damages in favor of Rogers Johnson, we must not only credit them with being men of ordinary intelligence, but we must assume that, from their own knowledge of the law and a superior discrimination, they placed a limitation upon the right of Rogers Johnson which was not expressed in the charge of the court, and could only be arrived at by implication arising upon another charge applicable to the rights of the mother alone. It is possible—we doubt, however, it is probable, and we feel sure that it is not at all certain—that the jury did disregard the charge of the court, and find such a verdict as the law required of them under the facts of the case; but uncertainty with regard to their action is fatal to this judgment. When a positive error has been committed, the court cannot enter into speculation as to what conclusions the jury may have arrived at in order to avoid the force and effect of such error upon a verdict; and more especially is this true in a case like the present, where the law in a large measure commits to the common sense and sound discretion of the jury the amount to be assessed. But in such a case the rule laid down in the cases above cited must be enforced, and if it does not appear from the record that the error was harmless, the judgment based upon such error must be reversed. The district court erred in giving the charge complained of, and the court of civil appeals erred in overruling the assignment based thereon.

The trial judge gave to the jury the following charge: "If, however, you believe the plaintiff, the boy, was

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on said crossing, if a crossing as alleged, and employees of defendant by the use of ordinary care could have discovered him in time to have prevented the injury, and failed by reason of their carelessness and want of proper care to do so, and that no injury would have resulted had said employees used the means in their power to prevent it, then it was their duty to prevent the injury, and their failure to do so was negligence." The issue presented by this charge is, could the employees of the defendant by the use of ordinary care have discovered the boy in time to prevent the injury, and did they by want of proper care fail to discover him, and if they had used proper care to discover him, and had made use of the means in their power to prevent the injury, would it have occurred? The objection to this charge is that there was no evidence before the jury which tended to prove that the employees could have discovered Rogers Johnson upon the crossing in time to prevent the injury by any means in their power. We have carefully examined the statement of facts, and find no evidence which tends to establish the proposition that defendant's servants who were operating the cars by which the injury was produced either saw Rogers Johnson before the injury occurred or that they could have seen him if they had exercised ordinary care in the discharge of their duties. Besides, we do not find any allegation in the petition which sets up this ground of negligence. It was, therefore, error for the court to give the charge to the jury. The charge last quoted is the only one that submits to the jury any ground of recovery as against the defendant, and, as the recovery of Mrs. Alice Johnson depends upon the right of Rogers Johnson to recover, the reversal of the judgment in his favor upon this ground must necessarily result in a reversal of the judgment in favor of his mother.

It is likewise complained by the plaintiff in error that the court in stating the issues presented by the

Instructions not
Warranted by Evi-
dence.

Reversed.

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pleading, stated that the petition alleged that the defendant's servants were incompetent and careless, there being no evidence of this fact. We do not consider that this constitutes reversible error in this instance, but it is not proper for the court, in making a statement of the case, to present any issue unless it is set up in the pleadings, and evidence tending to establish it has been introduced to the jury. For the errors indicated, the judgments of the district court and of the court of civil appeals are reversed, and the cause remanded.

Remarks by the
Court as Error.

NOTE.

Impairment of Earning Capacity During Minority—When Damages for, Are not Recoverable.—Unless there is evidence that a minor has been emancipated, there can be no recovery by him for diminution of earning power during minority. *Atlanta, etc., R. Co. v. Smith*, 94 Ga. 107; *Texas, etc., R. Co. v. Morin*, 66 Tex. 225; *Peppercorn v. Black River Falls*, 89 Wis. 38, 46 Am. St. Rep. 818. And see *Fort Worth, etc., R. Co. v. Measles*, 81 Tex. 474.

But there may be a recovery by an infant plaintiff for loss of earning power after majority; that is, in an action for damages brought by a minor, the jury may consider as an element of damages to the minor the value of his capacity to earn money, and the loss of it, which, however, as to him will not accrue until after his majority is attained. *Ft. Worth, etc., R. Co. v. Robertson*, (Tex. 1891) 16 S. W. Rep. 1093; *Schmitz v. St. Louis, etc., R. Co.*, 119 Mo. 256.

TURESS

v.

NEW YORK, S. & W. R. Co.

(Supreme Court of New Jersey, June 23, 1898.)

Injury to Child Playing on Turntable—Liability of Company.*—A railroad company which maintains a turntable upon its own land is not liable for an injury to a child who comes upon the land and receives the injury by playing with the turntable without any invitation express or implied.

Same—Implied Invitation.—An invitation to a child will not be implied from the fact that the turntable, obviously designed for another purpose, furnishes a place for play, which is attractive to children.

LUDLOW, J., dissenting.

(Syllabus by the Court.)

*See notes at end of case.

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ERROR by plaintiff to Passaic county circuit court.
Affirmed.

The judgment brought up for review was entered in favor of the defendant upon a demurrer to the plaintiff's declaration, the ground of decision being that no actionable wrong on the part of the defendant was disclosed thereby. The allegation of the declaration, in substance, is that the defendant company was the owner and operator of a railroad running through the city of Paterson, and that, in connection therewith, it operated and controlled a turntable on its land abutting on the south side of Ellison street, distant about 100 feet from the main tracks of the railway; that said Ellison street is a public highway in the residential portion of the city of Paterson aforesaid, and is daily passed over by large numbers of people,—men, women, and children,—who have a full and uninterrupted view of the said turntable as they pass along said street; that said turntable, which is about 50 feet long and 8 feet wide, extends in a northerly and southerly direction, and is so situated on the land aforesaid that the northerly end of its stationary abutment (which stationary abutment is about 10 feet long) is about 5 feet from the southerly line of said Ellison street; that said turntable is very dangerous for children to play with, but is, nevertheless, a device in its nature exceedingly attractive and alluring to children, and apt and likely to cause them to use it and turn it for their amusement and sport, and, in consequence of their so using and turning it, to hurt and injure themselves; that the only way in which the turntable could be safely and carefully maintained by the defendant was by surrounding it with a fence, and keeping it locked, to prevent the approach of children to it, and to prevent them from using it; that it was the duty of the defendant to use care, prudence, and precaution that children should not be injured thereby, and to that end to prevent approach and access to the turntable by fencing it around, and by securing it with a lock, so that it could not be turned by children who might resort

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to it; that the defendant, disregarding its duty in that behalf, failed to use reasonable care, prudence, and precaution, but carelessly and negligently maintained and controlled the turntable without any fence around it to prevent the access of children to it, and without keeping it locked. The declaration then avers that by means of the premises, and in consequence of said neglect and carelessness of the defendant, the plaintiff, an infant of the age of 10 years and 9 months, being attracted and allured by the turntable to play with the same, and to put the same in motion, did so; and while it was in motion—it having been moved by himself and his playmates—the plaintiff climbed on the end of it, resting on his belly, and was thereby, in the turning of the table, caught between it and the stationary abutment, and seriously injured.

Argued February term, 1898, before MAGIE, C. J., and LIPPINCOTT, GUMMERE, and LUDLOW, JJ.

William I. Lewis, for plaintiff in error.

John W. Griggs, for defendant in error.

MAGIE, C. J. (after stating the facts). The ground upon which the alleged duty of the defendant company is rested, involves the doctrine of the cases which have come to be called "Turntable Cases." The first case of importance in this country upon that subject is *Railroad Co. v. Stout*, 17 Wall, 657. That case has been followed more or less closely in a great number of cases, which may be found collected in 27 Am. & Eng. Enc. Law, 344. While the doctrine of the United States supreme court in the case cited has been adopted by many courts, it has, as we shall see, the dissent and disapprobation of other courts. It is now for the first time presented for consideration to the courts of this state. The rule of duty involved in the doctrine under consideration may be thus generally stated:

That a railroad company which maintains on its own ground a turntable, which from its attractiveness to the eyes of children, or from its being adapted by its construction to provide

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for children an attractive thing to play upon, is bound to take reasonable care that they be not injured thereby. Sometimes emphasis has been laid upon the fact that the turntable is maintained near public streets and places, or where people and children are accustomed to visit or pass through, as in *Ferguson v. Railroad Co.*, 75 Ga. 637. Sometimes it is stated more broadly, as by YOUNG, J., in *Keffe v. Railway Co.*, 21 Minn. 207, where he says that a railroad company, when it sets before young children a temptation which it has reason to believe will lead them into danger, must use ordinary care to protect them from harm. It is nowhere pretended that the rule applies in the case of adults, who under similar circumstances, would undoubtedly be trespassers, to whom the railroad company would owe no duty, or at most would be admitted by license or permission, and to them the railroad company would owe no duty but to abstain from willful injuries, and from maintaining hidden and concealed dangers. But the expressed notion is that under such circumstances young children are not trespassers, because allured and tempted to come upon the land of another, and not being of sufficient age to appreciate the dangers consequent on yielding to such temptation. It is obvious that the principle on which the rule rests, if sound, must be applicable more widely than merely to railroad companies and the turntables maintained by them. It would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery, or implement maintained by them thereon which possesses a like attractiveness and furnishes a like temptation to young children. He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water to his buildings; he who leaves his mowing machine or dangerous agricultural implements in his field after his day's work; he who maintains a pond in which boys may swim in summer or on which they may skate in winter,—would seem to be amenable to this rule of duty. Climbing, playing at work, swimming and skating, are attractions almost irresistible to

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children, and any landowner or occupier may well believe that such attractions will lead young children into danger. Many other cases of like character might be imagined. In all of them the doctrine of the Turntable Cases, if correct, would charge the landowner or occupier with the duty of taking ordinary care to preserve young children thus tempted on his land from harm. The fact that the doctrine extends to such a variety of cases, and to cases in respect to which the idea of such a duty is novel and startling, raises a strong suspicion of the correctness of the doctrine, and leads us to question it. The only ground upon which this doctrine can be supported, if at all, is that he who maintains on his land a thing having the attractiveness mentioned, is assumed thereby to invite upon his lands children of tender age to whom this attractiveness has proved a temptation too strong to resist, and to know what the conduct of children thus invited would probably be. The duty must arise, in my judgment, from this implied invitation. I use the word "invitation" as aptly expressing a well-known relation between an owner or occupier of land and one who comes thereon under certain circumstances. The nature and extent of the liability of the inviter are well settled. *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478. MR. JUSTICE DEPUE, in the case last cited, draws attention to a criticism of the master of the rolls in *Heaven v. Pender*, 11 Q. B. Div. 508, on the accuracy of the word "invitation," as commonly used in this connection. But the statement which the learned master of the rolls suggested as more accurately expressing the relation between the parties in such cases seems to be unnecessarily and erroneously broad. Invitation is a term whose legal import is known, and there is no reason for not using it to express the relation now under consideration. Invitation which creates such a relation may be express, as when the owner or occupier of land by words invites another to come on it, or make use of it or something thereon; or it may be implied, as

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when such owner or occupier, by acts or conduct, leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used. This definition originally given in *Sweeny v. Railroad Co.*, 10 Allen, 368, was approved and adopted by our court of errors. *Phillips v. Library Co.*, *ubi supra*. It will be observed that in the case of an implied invitation the relation is imposed upon the owner or occupier of land only when he has done something which justifies one who enters upon the land and makes use of it or something upon it in believing that he intended such use to be made; and he who makes such use can claim the relation only when he is justified, by the acts or conduct of the owner or occupier, in believing that such use was intended; and entry and use by such invitation is thus distinguished from entry and use by mere permission. Applying these views to the Turntable Cases, it is obvious that the relation between a railroad company and a

Same—Implied
invitation.

child who enters its lands to play with a turntable is not one created by implied invitation. A turntable, however attractive, could not be deemed to have been erected for the use which a child makes of it. This objection is not obviated by an appeal to the doctrine that children of tender years are not held to the same degree of prudence and care as adults, but only to such prudence and care as their years indicate them to possess; for it is not (yet) a question of the child's negligence, but a question of the duty of the railroad company towards the child. If that duty is conceived to arise from the relation created by implied invitation, it must appear that the child is justified in believing that the turntable was designed for the use he makes of it; which is, of course, absurd. In my judgment, it follows that the liability of a railroad company to a child injured by playing on

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its turntable cannot arise out of a duty imposed on the company by reason of a supposed implied invitation. If a child is not to be deemed invited to enter a railroad company's land to play upon a turntable, it also follows that a child in doing so is either a trespasser or is there by mere permission. In neither case is any duty cast upon the landowner, except to abstain from any willful injury, and from maintaining hidden or concealed dangers. As has been before stated, the doctrine of the supreme court of the United States in *Railroad Co. v. Stout* has not met with universal approval. In New York, at an early day, the court of appeals intimated that it could not be supported. *McAlpin v. Powell*, 70 N. Y. 126. Later cases in the supreme court, however, yielded to the prevailing opinions. *Walsh v. Railroad Co.*, 67 Hun, 604, 22 N. Y. Supp. 441; *Id.*, 78 Hun, 1, 28 N. Y. Supp. 1097. But upon an appeal of the case last cited the court of appeals, in a strong opinion by JUDGE PECKHAM, unanimously disapproved of the doctrine. *Walsh v. Railroad Co.*, 145 N. Y. 301, 39 N. E. 1068. In that case a child under six years of age was injured while playing on a turntable erected on a plot of ground partially unfenced, and across which the public had been permitted to go from one street to another. It was held that the facts did not justify the inference of an invitation to the child; that his presence there was by sufferance only, which did not cast upon the company any duty of active vigilance; and that the company owed no duty to the child to keep the turntable fastened. In Massachusetts the courts take a similar view. A boy was attracted to railroad premises by an unlocked and unguarded turntable near a highway, and also near the accustomed resorts of children, and was injured by playing with it. MR. JUSTICE LATHROP reviewed the decisions with care, and the court reached the conclusion that upon such facts no invitation from the company was to be inferred, but that the boy was a mere trespasser to whom the company owed no duty which

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was violated. *Daniels v. Railroad Co.*, 154 Mass. 349, 28 N. E. 283. A similar doctrine had been enunciated in other cases in that state where children were injured upon railroad property. *McEachern v. Railroad Co.*, 150 Mass. 515, 23 N. E. 231, and cases cited. In a case in New Hampshire a boy of seven years of age was injured while playing upon a turntable erected and maintained within 60 feet of a public street. He had been attracted to it by the noise of older boys playing upon it. The court repudiated the doctrine of *Railroad Co. v. Stout*, and held that, under the circumstances the railroad owed no duty to the boy. *Frost v. Railroad Co.*, 64 N. H. 220, 9 Atl. 790. These cases support the view previously expressed, and I think we should follow them as true expressions of the law on this subject. The principle which I maintain was, in my judgment, involved in a case decided in this court. I refer to *Vanderbeck v. Hendry*, 34 N. J. Law, 467. In that case children of tender years, out of childish curiosity, wandered through open gates into a lumber yard, and were there injured by the fall of a pile of lumber, which, it was claimed, was improperly secured. The lumber yard was adapted to excite the curiosity of children, for it was built over the water, and was intersected by narrow gangways bounded by high piles of lumber, and leading to the water. It was attractive to children, and, as it was in a populous district, its owner might fairly anticipate that, if the gates were left open, children would yield to its attractions. Yet this court held that under such circumstances the owner of the lumber yard owed no duty to care for the safety of the children who were trespassers or had entered by mere permission. It results that the declaration demurred to discloses the existence of no duty owing by the defendant company to the plaintiff, the neglect of which caused the injury for which he sues, and that, therefore, the judgment of the circuit court should be affirmed, with costs.

LUDLOW, J., dissents.

NOTES.

Injury to Children Playing on Turntables.—See 48 Am. & Eng. R. Cas. 535, *note*, 54 Am. & Eng. R. Cas. 117, *note*.

In *Stout v. Sioux City, etc.*, R. Co., 17 Wall. (U. S.) 657, the Supreme Court of the United States first announced the doctrine that if a railway company leaves unsecured upon its own property turntables or other dangerous machinery attractive to children, the company is negligent, and is liable for injuries caused to a child by setting in motion such machinery.

The majority of the state courts have followed this doctrine. *Gulf, etc.*, R. Co. *v. Styron*, 66 Tex. 421, 1 S. W. Rep. 161; *Evansich v. Gulf, etc.*, R. Co. 61 Tex. 24; s. c., 6 Am. & Eng. R. Cas. 182, 57 Tex. 126; *Houston, etc.*, R. Co. *v. Simpson*, 60 Tex. 103; *Gulf, etc.*, R. Co. *v. McWhirter*, 77 Tex. 356, 19 Am. St. Rep. 755; *Fort Worth, etc.*, R. Co. *v. Measles*, 81 Tex. 474; *Keffe v. Milwaukee, etc.*, R. Co., 21 Minn. 207; *O'Malley v. St. Paul, etc.*, R. Co., 43 Minn. 289; *Twist v. Winona, etc.*, R. Co., 39 Minn. 164, 37 Am. & Eng. R. Cas. 336; *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418, 10 Am. & Eng. R. Cas. 702; *Barrett v. Southern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 532, 27 Pac. Rep. 666, 91 Cal. 296; *Callahan v. Eel River, etc.*, R. Co., 92 Cal. 89; *Union Pac. R. Co. v. Dunden*, 37 Kan. 1, 34 Am. & Eng. R. Cas. 88; *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686; *Bridger v. Asheville, etc.*, R. Co., 25 S. Car. 24; *Illwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446, 22 Am. St. Rep. 169, 45 Am. & Eng. R. Cas. 68; *Ferguson v. Columbus, etc.*, R. Co., 75 Ga. 637; *Bates v. Louisville, etc.*, R. Co., 90 Tenn. 36, 15 S. W. Rep. 1069; *Atchison, etc.*, R. Co. *v. Bailey*, 11 Neb. 332, 10 Am. & Eng. R. Cas. 742; *Walsh v. Fitchburg R. Co.*, 67 Hun (N. Y.) 604; *Koons v. St. Louis, etc.*, R. Co., 65 Mo. 592; *Kolsti v. Minneapolis, etc.*, R. Co. (Minn. 1894), 19 Am. & Eng. R. Cas. 140; *Westerfield v. Levi*, 43 La. Ann. 63, 9 So. Rep. 52; *Ft. Worth, etc.*, R. Co. *v. Robertson*, (Tex.) 16 S. W. Rep. 1093; *Nagel v. Missouri Pac. R. Co.*, 10 Am. & Eng. R. Cas. 702, 75 Mo. 653, 42 Am. Rep. 418.

For a railroad company to leave a dangerous machine, such as a turntable, unfastened in a city lot which is not securely inclosed, and where people and children are wont to visit and pass through, is negligence. And if an infant of ten or twelve years of age resorts to the turntable, and in riding upon it is seriously injured, the railroad company is liable in damages for such injuries to the infant, and this is so notwithstanding the father of the infant permitted her to go near the turntable to carry breakfast to a brother who had been left by the father to protect other property of the company. The fault, if any, of the father, is not attributed to the infant, the action being brought by the infant herself. *Ferguson v. Columbus, etc.*, R. Co., 75 Ga. 637.

In *Keffe v. Milwaukee, etc.*, R. Co., 21 Minn. 207, YOUNG, J., said: "We agree with the defendant's counsel that a railroad company is not required to make its lands a safe playground for children. It has the same right to maintain and use its turntable that any landowner has to use his property. It is not an insurer of the lives or limbs of young children who play upon its premises. We merely decide that when it sets before young children a temptation which it has reason to believe will lead them into danger, it must use ordinary care to protect them from harm. What would be proper care, in any case, must, in general, be a question for the jury, upon all the circumstances of the case." The same judge also said: "To treat

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the plaintiff as a voluntary trespasser is to ignore the averments of the complaint, that the turntable, which was situate in a public (by which we understand, an open, frequented) place, was, when left unfastened, very attractive, and, when put in motion by them, was dangerous to young children, by whom it could be easily put in motion, and many of them were in the habit of going upon it to play. The turntable, being thus attractive, presented to the natural instincts of young children a strong temptation; and such children, following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between the plaintiff's position and that of a voluntary trespasser, capable of using care, consists in this, that the plaintiff was induced to come upon the defendant's turntable by the defendant's own conduct, and that, as to him, the turntable was a hidden danger, a trap."

In *St. Louis, etc., R. Co. v. Bell*, 81 Ill. 76, the turntable was a skeleton structure not covered with planks, and not protected by a wall, except where the rails of the switch intersected it. The turntable was not near any public street nor in a place where the public were in the habit of passing. It was fastened with a latch which prevented it from being turned by accident, but was not locked, so as to render it impracticable for boys to open or withdraw the latch and move the table. The court, after an examination of the testimony, decided that in view of the isolated position in which the turntable was located, the proofs failed to show that the railway company was guilty of such want of care as could lawfully charge it with damages for the accident.

Duty to Fasten and Secure Tables.—It is negligence to omit to secure turntables so that children cannot revolve them. If a child is injured in consequence of such an omission the company will be liable, and the fact that the turntable was being revolved by other children at the time will make no difference. *Nagel v. Missouri Pac. R. Co.*, 10 Am. & Eng. R. Cas. 702, 75 Mo. 653, 42 Am. Rep. 418.

A company is not relieved from liability for injuries to a child five years old, received while playing on a turntable, because the child itself is unable to turn the table, but where it played with others older who were able to turn it. *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. Rep. 26.

In an action for negligence in not properly securing a turntable, whereby a child six years of age received injuries causing death, the fact that, prior to the accident, an agent of the company tied the turntable with a rope so that it could not be revolved unless the rope was cut or untied, does not relieve the company from liability for its negligence in not adopting securer fastenings, where it is shown that the agent knew children were attracted to the machine, and were in the habit of playing upon it, and that the method of securing it had in the past proved insufficient. *Ilwaco R. & N. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. Rep. 335.

The proof showed that defendant maintained a turntable near a town, and in a place, away from the public road, frequented by boys and others for sport and recreation; that it was securely fastened by a wooden bolt which prevented its turning, but that this bolt

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could be removed by a boy of plaintiff's age; that on a Sunday when the turntable was not guarded, the plaintiff, with some companions, removed said bolt, and the plaintiff, endeavoring to leap upon the turntable while his companions revolved it, had his leg crushed, necessitating amputation. *Held*, that the court should have charged: (1) "That the defendant was not required to so fasten or secure the turntable that boys like the injured boy could not displace such fastening and put the table in motion;" (2) "That the defendant was not required to fasten the turntable any more securely than necessary to keep it securely in place;" and it was error for the court to qualify said propositions by the statement that the jury might consider "the amount of force or strength required to unfasten the turntable," or by the statement that even if the turntable were securely fastened, the company would be guilty of negligence if, by the exercise of ordinary care, it could have provided against injury to boys interfering with its turntable. This qualification renders the charge contradictory and confusing. *Bates v. Nashville, C. & St. L. R. Co.*, 90 Tenn. 36, 15 S. W. Rep. 1069.

The company's liability is not affected by the fact that the table was latched by the customary fastening of an iron latch dropped in a slot, or by the fact that the table was set in motion by the negligent act of other boys. *Callahan v. Eel River & E. R. Co.*, 92 Cal. 89, 28 Pac. Rep. 104. See also *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421, 1 S. W. Rep. 161; *Ferguson v. Columbus & R. R. Co.*, 77 Ga. 102; *Westerfield v. Levi*, 43 La. Ann. 63, 9 So. Rep. 52.

Liability Where Table is Turned by Others.—The company's liability is not affected by the fact that the table was turned by another child. *Nagel v. Missouri Pac. R. Co.*, 10 Am. & Eng. R. Cas. 702, 42 Am. Rep. 418, 75 Mo. 653; *Barrett v. Southern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 532, 91 Cal. 296; *Callahan v. Eel River & E. R. Co.*, 92 Cal. 89, 28 Pac. Rep. 104. Nor where the table was turned by a responsible person. *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356, 19 Am. St. Rep. 755, 14 S. W. Rep. 26.

Degree of Care Required of Company.—The owner of any machine such as a turntable, which he knows to be dangerous to children too young to know the danger, and of too immature judgment or discretion to control their natural instinct to amuse themselves with anything that may attract them as a plaything, and which he knows or ought to know may attract them, and who knows it is so placed that it does attract them to play with it, is under a duty, as to such children, to exercise the degree of care which an ordinarily prudent person would use to prevent its injuring them. What that degree of care requires him to do is ordinarily a question for the jury. *O'Malley v. St. Paul, M. & M. R. Co.*, 45 Am. & Eng. R. Cas. 62, 43 Minn. 289, 45 N. W. Rep. 440.

The judge declined to charge that "the degree of care required of defendant is only such as is exercised by well-regulated railroads over their turntables, and that if defendant exercised such care in this case, there was no negligence," saying that other railroads' negligence could not excuse negligence by this defendant, and that it was for the jury to say whether there was negligence here. In this there was no error. *Bridger v. Asheville & S. R. Co.*, 25 So. Car. 24.

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Proximate Cause.—In an action by the father for an injury done his little son, by the company's negligence in leaving unfastened a turntable, in playing on which the child was hurt, there was evidence tending to show that the table was well fastened; that it could not have been unfastened by a child of tender age; and that it was unfastened by those old enough to be responsible for their negligence. *Held*, that a charge of the court was proper and sufficient to the effect that, if the evidence showed that defendant's employees had fastened the turntable so that a boy of the age and strength of the child injured could not have removed it from its fastenings, or put it in motion, and that the turntable had been moved and put in motion by other persons, and that the child was injured in consequence of the neglect of such third persons, then the negligence of the company, if any, would not be the proximate cause of the injury, and the jury should find for the defendant. *Gulf, C. & S. F. R. Co. v. Evansich*, 63 Tex. 54.

Rule Where Child is Trespassing.—It is such negligence on the part of a company to erect a turntable at a place where boys often play, and to leave it without lock or fastenings, and without being watched or guarded, or fenced in, as to justify a jury in finding the company liable for injuries to a boy trespasser of 12 while playing on it. *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686.

If the company ought reasonably to have anticipated that because of the leaving of its turntable unguarded and exposed an injury to a child of immature years was likely to occur, it will be held to have anticipated it, and was guilty of negligence in maintaining it in its exposed condition; and the fact that a child injured thereby was a trespasser, and would not have been hurt if it had not intermeddled with the machinery, does not absolve the owner from liability therefor. *Barrett v. Southern Pac. Co.*, 48 Am. & Eng. R. Cas. 532, 91 Cal. 296, 27 Pac. Rep. 666.

Proof of Company's Negligence, Generally.—Where the issue is negligence in the care and manner of guarding a turntable, for the purpose of preventing children of tender years, having access to it, being injured, it is competent to prove that the fastenings to it were similar to those in general use on such turntables. *Kolsti v. Minneapolis & St. L. R. Co.*, 19 Am. & Eng. R. Cas. 140, 32 Minn. 33, 19 N. W. Rep. 655.

In an action by the parents of a young child for injuries sustained by it from a turntable situated in a public place, unguarded and unfastened, which had before attracted children, it was proper to show by the testimony of a boy that eighteen months before the accident he himself had been injured at the same place by the same turntable, and that he had sued for damages. *Ft. Worth & D. C. R. Co. v. Measles*, 81 Tex. 474.

And in such an action the record of a suit against the company by another child who had been injured at the same place and under similar circumstances is competent as evidence of notice to the company of the dangerous condition of the turntable. *Ft. Worth & D. C. R. Co. v. Measles*, 81 Tex. 474.

Proof Showing Custom of Railroad Companies.—While, in the case of its turntables and tracks standing on its tracks, by playing with which children are injured, it is competent for a company, in order to show that it exercised due care, to prove that it secured the turntables and trucks in the way customary with all railroad com-

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panies, such proof is not conclusive that due care was exercised. *O'Malley v. St. Paul, M. & M. R. Co.*, 45 Am. & Eng. R. Cas. 62, 43 Minn. 289, 45 N. W. Rep. 440; *Barrett v. Southern Pac. Co.*, 48 Am. & Eng. R. Cas. 532, 91 Cal. 296, 27 Pac. Rep. 666.

Where a company is charged with negligence in failing to keep a turntable locked, whereby a child is injured while playing on it, the question of negligence must be determined by the facts of the case; therefore the custom of other companies in not locking or guarding their turntables is immaterial. *Gulf, C. & S. F. R. Co. v. Evansich*, 61 Tex. 3.

So the custom of other railroads, as to keeping their turntables locked, is immaterial upon the issue whether or not the defendant railroad was guilty of negligence in not doing so. *Koons v. St. Louis & I. M. R. Co.*, 65 Mo. 592.

Evidence of the custom of railways to keep turntables unfastened at all times, whether in actual use or not, and whether inclosed or in an open public place, is inadmissible in an action against a company to recover for the death of a child of tender years, injured by reason of the company's unlocked turntable. *Ilwaco R. & N. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. Rep. 335.

Sufficiency of Proof.—To hold a company liable for the consequences of its negligence in leaving a turntable unfastened and unguarded, it is not necessary to show that the company was the owner of the turntable. It is sufficient if it appears that it was in the charge or under the control of the company. *Nagel v. Missouri Pac. R. Co.*, 10 Am. & Eng. R. Cas. 702, 75 Mo. 653, 42 Am. Rep. 418.

There being testimony that the turntable was dangerous, was located in an exposed place, easily accessible, unfenced, unguarded, and unlocked; that the plaintiff was at an age when he could not understand that the turntable was dangerous and that he had no right to intermeddle with it—there was some pertinent testimony upon the issue of negligence, and a nonsuit was properly refused. *Bridger v. Asheville & S. R. Co.*, 25 So. Car. 24.

Company's Negligence is a Question of Fact.—Where there is a conflict in the testimony as to the situation of a turntable in reference to its nearness to a populous neighborhood of the city, it should be left to the jury to determine from all the circumstances whether the company was guilty of negligence in its erection and in not maintaining it in a properly guarded condition. *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. Rep. 50.

In an action by a small boy to recover for an injury received while playing on a turntable, the question of the company's negligence is for the jury, where it appears that the table was unfenced, unlocked, and unguarded, and left so that small boys could easily turn it, though it was situate in a small village and not in the immediate neighborhood of any houses, and three fourths of a mile from plaintiff's home. *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657.

And although the facts were undisputed—*held*, that this did not make the question of the company's negligence one of law, to be determined by the court, but it was a question of fact, for the jury. *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657.

A company erected a turntable in a populous neighborhood on its own land, which was only partially inclosed, and was used by the public for many of the purposes of a highway. It was a place where

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children might naturally go for amusement; the table was easily handled, and children came from time to time to play on it. *Held*, in an action for an injury to a child, that it was proper to submit to the jury whether the company "had invited, allured, or enticed the plaintiff upon its premises, and to play with the turntable; and if it had, whether such turntable was left in such a condition as to charge the company with any resulting injury." (PUTMAN, J., dissents.) *Walsh v. Fitchburg R. Co.*, 51 N. Y. S. R. 240, 67 Hun 604, 22 N. Y. Supp. 441.

In an action for injury done a little child by the company's negligence in leaving unfastened a turntable whereby the child playing on it was hurt, there was evidence tending to show that the table was well fastened, that it could not have been unfastened by a child of tender age, and that it was unfastened by those old enough to be responsible for their negligence. *Held*, it was the duty of the court to give an instruction fairly submitting to the jury whether the servants of the corporation had so fastened its turntable that children *non sui juris* could not have unfastened it and used it. *Evansich v. Gulf, C. & S. F. R. Co.*, 61 Tex. 24.

Contributory Negligence of Child.—If a child does not know that it is unsafe to play on a turntable, it cannot be said that he is guilty of contributory negligence in doing so, even though he has sufficient knowledge to know that it is wrong to trespass there. *Union Pac. R. Co. v. Dunden*, 34 Am. & Eng. R. Cas. 88, 37 Kan. 1. Contributory negligence cannot be imputed to a small boy who is injured while playing with other boys upon a turntable. *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657. The negligence of an older sister, in whose charge the child was, cannot be imputed to the child. *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. Rep. 26.

But knowledge on the part of the child that he has no right to play upon the turntable, and that it is dangerous to do so, renders him guilty of such contributory negligence as to prevent recovery. *Twist v. Winona, etc., R. Co.*, 37 Am. & Eng. R. Cas., 336, 39 Minn. 164.

Rule in Massachusetts and New Hampshire.—The courts of Massachusetts and New Hampshire, however, hold that the company is not liable, either upon the ground of an implied, or of a duty to refrain from ordinary negligence in the management of its table. *Daniels v. New York, etc., R. Co.*, 154 Mass. 349, 48 Am. & Eng. R. Cas. 539.

In the case of *Frost v. Eastern R. Co.*, 64 N. H. 220, which is disapproved in the principal case, the supreme court of New Hampshire said: "The motion for a nonsuit raises the question whether there was evidence upon which the jury could properly find a verdict for the plaintiff. *Paine v. Grand Trunk R. Co.*, 58 N. H. 611. The ground of the action is that the defendant was guilty of negligence in maintaining a turntable insecurely guarded, which, being wrongfully set in motion by older boys, caused an injury to the plaintiff, who was at that time seven years old, and was attracted to the turntable by the noise of the older and larger boys turning and playing upon it. The turntable was situate on the defendant's land about 60 feet from the public street, and cut in with high, steep embankments on each side, and the land on each side was private property and fenced. It was fastened by a toggle, which prevented its being set in motion unless the toggle was drawn by a lever to which was attached a switch padlock, which, being locked, prevented

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the lever from being used unless the staple was drawn. At the time of the accident the turntable was fastened by the toggle, but it was a controverted point whether the padlock was then locked. When secured by the toggle, and not locked with the padlock, the turntable could not be set in motion by boys of the age and strength of the plaintiff. Upon these facts we think the action cannot be maintained. The alleged negligence complained of relates to the construction and condition of the turntable, and it is not claimed that the defendant was guilty of any active misconduct towards the plaintiff. The right of a land owner in the use of his own land is not limited or qualified like the enjoyment of a right or privilege in which others have an interest, as the use of a street for highway purposes under the general law, or for other purposes under special license (*Moynihan v. Whidden*, 143 Mass. 287), where care must be taken not to infringe upon the lawful rights of others. At the time of his injury, the plaintiff was using defendant's premises as a playground without right. The turntable was required in operating the defendant's railroad. It was located on its own land, so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers. *Aldrich v. Wright*, 53 N. H. 404. Under these circumstances, the defendant owed no duty to the plaintiff, and there can be no negligence nor breach of duty where there is no act or service which the party is bound to perform or fulfill. A landowner is not required to take active measures to insure the safety of intruders, nor is he liable for an injury resulting from the lawful use of his premises to one entering upon them without right. A trespasser ordinarily assumes all risk of danger from the condition of the premises, and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care, after discovering the danger. *Clark v. Manchester*, 62 N. H. 577; *State v. Manchester & L. R. Co.*, 52 N. H. 528; *Sweeney v. Old Colony & N. R. Co.*, 10 Allen, (Mass.), 368; *Morrissey v. Eastern R. Co.*, 126 Mass. 377; *Severy v. Nickerson*, 120 Mass. 306; *Morgan v. Hallowell*, 57 Me. 375; *Pierce v. Whitcomb*, 48 Vt. 127; *McAlpin v. Powell*, 70 N. Y. 126; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76; *Gavin v. City of Chicago*, 97 Ill. 66; *Wood v. School District*, 44 Iowa 27; *Gramlich v. Wurst*, 86 Pa. St. 74; *Cauley v. Pittsburgh, C. & St. L. R. Co.*, 95 Pa. St. 398; *Gillespie v. McGowan*, 100 Pa. St. 144; *Mangan v. Atterton, L. R. 1 Exchange*, 239. The maxim that a man must use his property so as not to incommode his neighbor only applies to neighbours who do not interfere with it or enter upon it. *Knight v. Abert*, 6 Pa. St. 472. To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it. We are not prepared to adopt the doctrine of *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.), 657, and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut

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it down or enclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of the premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists. The supposed duty has regard to the public at large, and cannot well exist as to one portion of the public, and not to another, under the same circumstances. In this respect, children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different care; but precautionary measures having for their object the protection of the public must, as a rule, have reference to all classes alike. *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn. 461."

Riding on or Playing with Turntables.—Where a turntable was constructed in an isolated place, but not covered or walled, and was left latched but not locked—*held*, that a boy nine years old could not recover for an injury received while riding thereon. *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76.

A boy of thirteen, who joins others after they have unfastened a turntable, and places himself on it to ride in a position in which he admits that he knew there was danger, is guilty of such contributory negligence as would prevent a recovery for the injuries so received; and the evidence of the facts being uncontroverted, it is proper for the court to instruct the jury to find for the defendant. *Merryman v. Chicago, R. I. & P. R. Co.*, 85 Iowa 634, 52 N. W. Rep. 545.

A boy attracted to railroad premises by a turntable thereon left unlocked or unguarded near a public highway, or in an open and exposed position near the accustomed or probable place of resort of children, cannot recover for personal injuries sustained while at play upon the turntable, either on the ground of an implied invitation to come there, or of a duty on the part of the corporation to refrain from ordinary negligence in its management of the turntable. *Daniels v. New York & N. E. R. Co.*, 48 Am. & Eng. R. Cas. 539, 154 Mass. 349, 28 N. E. Rep. 283.

An instruction to the jury, "If you believe from the evidence that the plaintiff had intelligence enough to appreciate the peril of getting on the defendant's turntable in the manner the evidence shows he did; or if you believe he was warned by defendant's employee not to get on said turntable, and that it was dangerous to do so, and said plaintiff understood and appreciated such warning, but did, nevertheless, get on said turntable and was thereby the direct cause of his injury, you will find for the defendant." was properly given in an action by the child to recover damages for injuries sustained at a railroad turntable. *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103.

Deleware, I. & W. R. Co. v. Riech

DELAWARE, I. & W. R. Co.

v.

REICH.

(Court of Errors and Appeals of New Jersey, June 24, 1898.)

Injury to Child Playing on Turntable—Liability.*—The plaintiff, a young child, was injured while upon a turntable of the defendant company. The turntable was located upon the private property of the defendant, near to a public street, and was entirely unprotected and unguarded. Children of all ages frequently congregated upon the defendant's premises to play upon the turntable. *Held*, that there was no liability on the part of the railroad company to answer for the plaintiff's injury.

Same.—A landowner is ordinarily under no obligation to a mere licensee or to a trespasser to keep his premises in a safe condition; and the fact that the licensee or the trespasser is an infant of tender years affords no reason for modifying this rule, and charging the landowner with a duty which does not otherwise exist.

Same.—When an owner of lands erects upon his premises, for their more beneficial user, a structure which happens to be attractive to children, he does not, by such action, extend an invitation to children to enter thereon.

DIXON, LUDLOW, and KRUEGER, JJ., dissenting.

(Syllabus by the Court.)

ERROR by defendant to Essex county circuit court;
Child, Judge. *Reversed.*

The defendant in error (who was the plaintiff below), on the 15th day of June, 1896, then being 13 years of age, had her foot crushed while in the act of rescuing her brother, a child of 6 years of age, who was playing on a turntable of the defendant company. It appeared in the case that the brother of the plaintiff, in company with several other little children, went to the company's turntable to play, and that she, deeming her brother to be in peril, went to the turntable, while the same was motionless, for the purpose of taking her brother off; and that while she was in the act of stepping with him from the turntable, it was turned by one of the other children, and her foot was thereby caught, and crushed so badly that it had to be

Case Sta'd.

*See *Turess v. New York, S. & W. R. Co.*, *ante*.

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amputated. It further appeared that the turntable was located in an open field on the land of the company, within 90 feet of a public street, and was entirely unguarded and unprotected. It also appeared that a path led across this field, passing the turntable within a few feet, and this path was used by the public without any hindrance or objection on the part of the railroad company. It also appeared that the turntable was frequented by children of all ages, who congregated there for the purpose of playing upon it. That the case was left to the jury on the theory that, if the turntable was a structure of a character to tempt children to meddle with it, and dangerous to them if they yielded to the temptation, the railroad company was chargeable with the duty of using reasonable care to protect them from harm, the negligent performance of which would render the company liable for injuries received. There was a verdict for the plaintiff.

Depue & Parker, for plaintiff in error.

Samuel Kalisch, for defendant in error.

GUMMERE, J. (after stating the facts.) This case was tried below, and has been argued here by counsel on both sides, on the theory that the legal position of the parties, so far as their respective rights and duties are concerned, is the same as if the plaintiff had been injured while herself playing upon the defendant company's turntable, in ignorance of the danger to which she was subjecting herself; and that such ignorance was due to the fact that she was not of an age to understand or appreciate the peril. For the purpose of disposing of the case, therefore, it will be assumed that this is the true situation of the parties; although it may well be considered that the plaintiff in doing what she did, took upon herself all the risk of danger which was incident to her undertaking. The underlying question, upon the solution of which our decision must rest, is whether the owner of land who constructs or places upon it anything which, though necessary for its proper enjoy-

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ment, happens to be of a character which is attractive to children, and at the same time dangerous to them if they yield to the attraction, thereby becomes chargeable with the duty of using reasonable care to keep them off his premises, or to protect them if they enter ; for it must be admitted that, unless such user creates a duty on the part of the land owner to protect the child, who comes upon his premises, the neglect of which produces injury to the child, no liability rests upon him for such injury. If there is no duty in the case, there can be no negligence. There cannot be such a thing as the negligent performance of a nonexistent duty. It is universally acknowledged that no such duty rests upon the owner of lands with regard to adults, but in many of the decided cases a distinction is made between trespassers of mature years and children, and it is held that, as to the latter, the duty of protection exists. Most of the cases in which this doctrine has been enunciated have arisen on facts similar to those presented by the case now before us ; that is, in cases where children have been injured while playing upon turntables located upon the private property of railroad companies. *Railroad Co. v. Stout*, 17 Wall. 657, is the first of this line of cases. *Keffe v. Railroad Co.*, 21 Minn. 207 ; *Koons v. Railroad Co.*, 65 Mo. 592 ; *Railroad Co. v. Fitzimmons*, 22 Kan. 686 ; *Ferguson v. Railway Co.*, 75 Ga. 637 ; and *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 27 Pac. 666,—also support this doctrine, and are, all of them, so-called “turntable cases.” It is apparent, however, that, if the duty exists in the case of a railroad company having a dangerous attraction upon its land, it exists equally in the case of a private land owner, who, for the purpose of carrying on his business properly, maintains upon his premises an attraction of a character dangerous to children. And, in fact, numerous cases may be found in the books where “dangerous attractions” other than turntables, placed upon the premises of the individual owner, for their more complete beneficial user, have been held to charge him with the duty of protecting children who

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are allured thereby. *Siddall v. Jansen*, 168 Ill. 43, 48 N. E. 191; *Birge v. Gardner*, 19 Conn. 507; *Whirley v. Whiteman*, 1 Head, 610; *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257; and *Bransom's Adm'r v. Labrot*, 81 Ky. 638,—are cases of this character. But, although this doctrine has received the support of many courts of high distinction, it has been absolutely repudiated by other courts whose decisions rank equally high. The cases of *Frost v. Railroad Co.*, 64 N. H. 220, 9 Atl. 790, *Daniels v. Railroad Co.*, 154 Mass. 349, 28 N. E. 283, and *Walsh v. Railroad Co.*, 145 N. Y. 301, 39 N. E. 1068, all declare that no distinction exists between adults and infants when entering uninvited upon lands of another, with relation to the duty which the owner or occupier of such lands owes to them. The same view is expressed by the supreme court of this state in the case of *Turess v. Railroad Co.*, 40 Atl. 614, in an opinion by *MAGIE*, C. J., which has lately been promulgated, in which the whole subject is carefully and exhaustively considered. This court, however, has, up to the present time, never been called upon to decide the question, and we are free to adopt either the view taken by the United States supreme court in *Railroad Co. v. Stout*, *supra*, and the cases which have followed it, or that taken by the courts of Massachusetts, New Hampshire and New York, as well as by our supreme court, according as the one or the other shall the more commend itself to us.

It must be conceded, I think, that the rule which imposes liability upon the landowner is a hard one, so far as he is concerned, in this respect; that, no matter how carefully he may endeavor to protect himself by discharging the duty which the law places upon him, the probability of his failure is great. When contemplating the alteration of his land from the condition in which nature left it for the purpose of obtaining a more beneficial user therefrom, he must first consider whether the alteration will render it attractive to children of tender years, and, if so, whether they will be subjected

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to danger if they succumb to the attraction. If he honestly concludes that the change will not operate to attract children, and that, therefore, although it may make his property dangerous, he is under no obligation to provide for their safety, or if he concludes that, although the alteration may render his property attractive to children, they will not incur danger by coming upon it, and for either of these reasons fails to take precautions for their safety, it will be for the jury to say whether he must answer for the result if injury to a child follows upon his omission; and their verdict will depend upon whether, in their opinion, he had reasonable ground for his conclusion. So, too, if he appreciates that the change which he proposes to make will render his premises dangerously attractive to children, and takes precautions to exclude them therefrom, it is still possible that they may elude his vigilance, and receive hurt while trespassing; and when that occurs it at once becomes a question for the jury to say whether or not the injury was the result of the want of due care on the part of the landowner in affording that protection which his duty required. What the conclusion of the jury would be in any given case, of course no one can tell. The fact, however, is suggestive that in every reported case, so far as I have examined them (and I have examined many), where this doctrine has been under consideration, it has always been the landowner, and never the injured child, who was trying to avoid the result of the verdict of the jury. It is only in those cases where the action of the jury has been controlled by the trial court that the injured child has sought a review. The probability that the landowner will not be able to avoid liability for injuries to children who come upon his lands without invitation, no matter how careful he may have been, while it affords no reason for denying the existence of the rule which holds him to responsibility, certainly requires that we should not accept it as sound, unless it rests upon a solid foundation. Some of the cases above cited, in which the liability of the landowner has been sustained, assume that

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the duty of protection rests upon him merely by reason of the inability of the child to care for its own safety, and discuss only the question whether the alleged duty has been negligently performed. Others of the cases consider the question of the existence of the duty, and sustain it on the ground that the landowner who places upon his land anything which is attractive to children, and at the same time dangerous to them if they yield to the attraction, is presumed to know that they are likely to be overcome by the temptation presented to them, and that, therefore, he is to be considered as having "allured" or impliedly invited them to come upon his premises, and submit themselves to the dangers there encountered.

The suggestion contained in the line of cases first adverted to, viz., that the duty of protection is cast upon the landowner solely by reason of the inability of the child to care for its own safety, seems to me to be un-

sound in principle. Primarily, the duty of
same. affording protection to a child rests upon the parent, who is responsible for its being. If the parent neglects the duty which the law casts upon him, and permits his child to stray upon the land of another, and there incur peril, why should the duty of protection be shifted from the negligent parent to the owner of the land? It is usually the fact, in cases of this kind, that the landowner has no knowledge that children have come upon his premises, and are exposed to danger there, until after injury has actually occurred; while other persons, who are passing by, frequently observe the risk that is being run by childish intruders, but take no steps to bring it to an end. If the duty of protection, under such circumstances, is to be shifted from the parent to a third person, it would seem more consonant with reason to place it upon those who have knowledge of the existence of the danger and opportunity to terminate it, rather than upon the landowner, who is entirely ignorant of the entry of the children upon his premises. The mere fact that a child is unable to guard itself against peril, and that its parent fails to

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provide for its safety, does not, *ipso facto*, cast upon any third person the duty of affording it protection.

Nor am I able to appreciate the force of the reasoning upon which the conclusion is based that a landowner who puts upon his premises a structure which is attractive, and also dangerous, to children, is to be regarded as having by implication invited them to enter, or as having "allured" them into danger, and is, therefore, to be held to the same measure of responsibility as if he had expressly invited them to come upon his lands. No one, I presume, will contend that a landowner, who, in the beneficial user of his premises, places thereon something which attracts children into danger, really puts it there with the intention of extending an invitation to them, or of luring them into jeopardy. On the contrary, it will be admitted that the entry is ordinarily against the desire of the landowner, and that, if his permission were asked, it would be refused. But the argument is that the intent, although it does not exist in fact, nevertheless exists in law, because every man is presumed to intend the natural consequences of his acts. The fallacy of this argument is clearly shown in an interesting and instructive article on the liability of landowners to children entering without permission, by Hon. Jeremiah Smith, former justice of the supreme court of New Hampshire, published in the Harvard Law Review in January and February, 1898. The author says: The "so-called, presumption that every man intends the probable consequence of his acts is not a rule of law further or otherwise than as it is a rule of common sense; in other words, the 'presumption' is, at most, only a *prima facie* presumption, and may be strong, weak, or utterly inefficacious, according to the varying situations where the attempt is made to apply it. If the result in question is one which men are frequently prone to desire, and there is no assignable reason for the act except the single one of accomplishing that particular result, the inference that the result was intended is strong. If, on the other hand, the result is one which not one man

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in ten thousand desires, and there is another assignable reason for the act, and one, moreover, by which men are generally influenced, and which is amply sufficient to account for the act, the inference is, practically speaking, reduced to Zero." If the landowner is to be held responsible for injuries resulting from an entry by a child upon his premises, merely because he has placed there something which presents a temptation to the child that it cannot (or, rather, does not) resist, although the entry is not only without his consent, but against his desire, why, in principle, is he not equally responsible for injuries received by an adult trespasser, who yields to the temptation presented by a dangerous attraction which is placed upon the land, particularly if such trespasser be so constituted mentally as not to appreciate the impropriety of his entry, or to understand the danger which he is incurring? The viciousness of the reasoning which fixes liability upon the landowner because the child is attracted lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted. As was said by HOLMES, J., in *Holbrook v. Aldrich*, 168 Mass. 16, 46 N. E. 115: "Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen."

No good purpose will be effected by discussing here the various cases which have been supposed to sustain the doctrine first put forward in *Railroad Co. v. Stout*, *supra*. I refer to cases like *Bird v. Holbrook*, 4 Bing. 628, where the plaintiff was injured while trespassing upon the lands of the defendant by the discharge of a spring gun, which had been set by the defendant for the protection of his property against thieves; *Townsend v. Wathen*, 9 East, 277, where the plaintiff's dogs

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were caught and killed in traps set by the defendant upon his premises, and baited with decaying meat, for the purpose of entrapping his neighbor's dogs; and *Lynch v. Nurdin*, 1 Q. B. 29, where the plaintiff, a child, was injured while playing with a horse and cart which the defendant's servant had carelessly left standing unguarded in the public highway. That they are not, in fact, authority for any such doctrine is clearly shown by *PECKHAM, J.*, in *Walsh v. Railroad Co.*, and by *LATHROP, J.*, in *Daniels v. Railroad Co.*, *supra*.

The general rule with regard to the duty which a landowner owes to persons coming upon his premises is that, where the entry is made by his invitation, either express or implied, he is required to use reasonable care to have his premises in a safe condition; but that, where the entry is made merely by his permission (and, *a fortiori*, where it is an actual trespass), the landowner is under no obligation to keep his premises in a nonhazardous state; his only duty to a licensee or a trespasser is to abstain from acts willfully injurious. And this rule has been frequently enforced by the courts of this state. *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478; *Mathews v. Bensel*, 51 N. J. Law, 30, 16 Atl. 195; *Vanderbeck v. Hendry*, 34 N. J. Law, 467; *Fitzpatrick v. Glass Co.* (N. J. Sup.) 39 Atl. 625; *Turess v. Railroad Co.*, *supra*. In the cases of *Frost v. Railroad Co.*, *Daniels v. Railroad Co.*, *Walsh v. Railroad Co.*, and *Turess v. Railroad Co.*, *supra* (in which, as has already been stated, the courts of New Hampshire, Massachusetts, New York, and our own supreme court have refused to adopt the rule of liability as declared in *Railroad Co. v. Stout*, and the cases which followed it), the basis of decision was the rule just adverted to. In the New York case the infant plaintiff was conceded to have been upon the defendant company's premises by its permission. In the Massachusetts and New Hampshire cases he was a mere trespasser. In each case the conclusion was that a licensee or a trespasser, who entered upon the lands of another, assumed all risk of

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danger which was incident to the condition of the premises; that the landowner was not responsible for injuries received by him unless they were intentionally inflicted; and that the fact of the licensee or trespasser being an infant of tender years afforded no reason for modifying the rule, and charging the landowner with a duty which did not otherwise exist. In *Vanderbeck v. Hendry, Fitzpatrick v. Glass Co., and Turess v. Railroad Co., supra*, our supreme court took a similar view, holding in each case that the infancy of the plaintiff afforded no ground for a recovery against the landowner. In my judgment, the reasons upon which the doctrine of landowner's liability for injuries received by children entering upon his premises is rested do not justify such a material restriction upon the full and untrammelled enjoyment of real property. On the contrary, it seems to me that the doctrine of nonliability, promulgated by the line of cases last referred to, is more in accord with settled principles, and should therefore be adopted by this court. I conclude, therefore, that there was error in submitting to the jury the question whether, under the circumstances of this case, the defendant company was chargeable with the duty of providing for the safety of the plaintiff. The trial judge should have directed a verdict for the defendant. The judgment below should be reversed.

DIXON, LUDLOW, and KRUEGER, JJ., dissent.

COLLINS, J. (concurring). The trial judge expressly charged the jury that proprietors of land are "liable for injuries resulting to children, although trespassing at the time, when, from the peculiar nature and open and exposed position of some dangerous defect or agent, the owner should reasonably anticipate such an injury to flow therefrom as actually happens;" and, in effect, he also charged that if "the turntable was, from the construction and location, as to children of tender years, a dangerous, and at the same time an alluring, machine,—one which when seen would allure children to come upon it for the purpose of playing upon it,"—or if "it was located in such proximity to the public high-

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way, or the locality was such a public one, that it might be reasonably anticipated that children would be allured to it," then a duty was due from the defendant "to exercise due care to protect children of tender age from injury." Exception was duly taken. The Chief Justice, in repudiating like assumptions in the Turess Case, now approved, gave conclusive reasons for holding them erroneous, and for those reasons I vote to reverse the judgment now before us. MR. JUSTICE GUMMERE correctly recites the untenable theory upon which this case was left to the jury, and nothing more is rightly now involved. The question of duty to children who, by license of the owner, are upon private property in proximity to an alluring danger, is not at present open for decision.

CALLERY *et ux.*

v.

EASTON TRANSIT COMPANY.

(Supreme Court of Pennsylvania, March 21, 1898.)

Death of Child on Street Railway Track—Liability.*—A street railway company is not liable for the death of a child resulting from his darting suddenly upon the track immediately in front of an approaching car which could not be stopped in time to prevent the accident.

Cross-Examination.—It was not error to refuse to allow plaintiffs to call the motorman of such car as if on cross-examination, he not being a party and having no legal interest in the pending suit.

APPEAL by plaintiffs from Northampton county court of common pleas. *Affirmed.*

Edward J. Fox and *James W. Fox*, for appellant.

F. W. Edgar, *R. J. Stewart*, *H. J. Steele*, and *J. D. Brodhead*, for appellee.

*See 9 Am. & Eng. R. Cas., N. S., note, 532 *et seq.*

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PER CURIAM. This case was properly disposed of by the learned court below. The undisputed testimony on the part of the plaintiffs established beyond all question that the death of the child was caused by his suddenly darting upon the track immediately in front of the approaching car, and that it was not possible to stop the car in time to prevent the collision. In such circumstances, as we have frequently held, there is no right of recovery, because there is no breach of legal duty to the child.

There is no merit in the second assignment. The motorman, Barnet, was neither a party nor a person having legal interest in the pending suit, and hence the plaintiffs had no right to call him as if on cross-examination. The remaining assignments are of no importance, and cannot be sustained. Judgment affirmed.

WILLIS

v.

KENTUCKY & I. BRIDGE CO. *et al.*

(*Court of Appeals of Kentucky, June 18, 1898.*)

Injury to Property from Noise and Vibration of Trains—Right of Action not Confined to Abutters.—A citizen suffering special inconvenience not experienced by the public at large from the operation of a railroad may maintain an action for damages for such inconvenience, although he is not an abutter, and the railroad company has acquired its right of way by condemnation, and not along a public street and is operating its trains in a reasonable manner.

APPEAL by plaintiff from Jefferson county circuit court. *Reversed.*

J. L. Clemmons, for appellant.

Chas. H. Gibson, E. P. Humphrey, and Young, Trabue & Young, for appellees.

PAYNTER, J. The appellant, Willis, does not seek to recover damages to property which abuts on a street

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along which the tracks of the appellees are constructed ; but his house, which he claims is damaged, is situated on a lot fronting on Montgomery street, in Parkland, across which the railroad track diagonally passes at a point about 75 feet from the house, and continues a southeast course until it passes the house at a point about 150 feet from it. The several tracks of the appellees are so constructed that the track we have described and other tracks form substantially what is known as a Y among railroad men, one angle of which is in front, and another east, of Willis' house. As well as for other purposes, these tracks are used for putting cars into trains and switching. The grade is such at one place that it takes two engines to carry heavy freight trains up it. The evidence conduces to prove that at least 100 locomotive engines pass daily over the tracks by Willis' house ; that the freight trains sometimes are necessarily forced to remain on the tracks 20 or 30 minutes ; that the trains are moving on the tracks during the night and day ; that great noises are made by the engines ; that smoke and cinders are forced into the house ; that the vibration from the operation of the trains caused plastering on the walls of the house to fall, in consequence of which the property is no longer comfortable as a place of residence, and its value has been diminished about \$1,000. It is not claimed that the means of ingress and egress have been abridged, nor that the damages result from the negligent operation of the trains upon the tracks, but, on the contrary, it is alleged that the damage results from their prudent operation.

So far as we are aware, the cases which have reached this court involving the question of the liability of railroads for constructing their tracks so as to impair ingress and egress, and for throwing smoke, soot, and cinders, to the damage of property, were brought by abutting owners. In some of these cases the court discussed the character of interest which the abutting owner had in the street which had been dedicated to public uses. Possibly the court thought it necessary

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to do this with a view of determining the right of the suitor to recover the damage resulting from the abridgment of his ingress and egress. Although the abutting owner or his vendee may never have owned the land dedicated to the public as a street, still his right to the use of it is the same as that of any other inhabitant of the city, or the abutting owner who lives on the opposite side of the street, from whom the city may have procured the land constituting the street between their property. Any abutting owner so situated, who has his means of ingress and egress impaired, has a cause of action which is as good as if he originally owned the land used as a street, and dedicated it to the city for the purpose of a street. It was said in *Railroad Co. v. Esterle*, 13 Bush, 674, that "the owners of the fee are as completely subordinated to the superior rights of the municipality to control, manage and possess its streets as the public in general. The owner of a lot fronting on a particular street has a peculiar interest in that street. His title carries with it, as an essential incident, certain valuable and indispensable services and easements in and over that street, which are as inviolable as his property in the lot itself. *Railroad Co. v. Applegate*, 8 Dana, 289; *Railroad Co. v. Brown*, 17 B. Mon. 772; *Bridge Co. v. Foote*, 9 Bush, 264; *Cosby v. Railroad Co.*, 10 Bush, 288; *Railroad Co. v. Combs*, *Id.*, 382. But this peculiar right does not depend upon or spring out of the ownership of the fee. It exists as well when the fee is in the public as when it is in the lot owner, and its existence is in no sense inconsistent with the exclusive actual possession of the street by the public." The right of an abutting owner to recover damages of a railroad for throwing soot, cinders, etc., upon his property, does not arise from his interest in the street. This damage does not result because the railroad track is located upon a street, except in so far as the running of trains on it is in such proximity to the property as to produce the injury. If it had been located on a lot adjoining that of Willis, which had been pur-

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chased from some one other than him, and the effect of the operation of the road had been the same as described in this case, a cause of action would have existed. When a railroad is constructed through a city by legislative authority, and it occupies the streets by municipal license, it is in the lawful exercise of a right. When it enters a city by legislative authority, and, by contract or condemnation, acquires the right to, and does, locate its road on private property, it is in the lawful exercise of a right. In either case, if, in the operation of the road, soot, cinders, etc., are thrown upon the property which abuts on the street, or upon property which abuts upon the private property acquired as indicated, and the owner is thus injured, he may maintain his action.

This court has adjudged that for injury to the property of abutting owners, by the falling of soot and cinders upon it, or from smoke entering the house, or from vibration of running trains, an action can be maintained. Whenever a railroad company has been granted authority to use a street, it is accompanied with an implied qualification that its use shall not unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Such a grant does not license the railroad company to use the street in disregard of the private rights of others, and with immunity for their invasion. Legislative authority to so use a street does not deprive a citizen of the right to maintain an action for damages for any special inconvenience and discomfort not experienced by the public at large. As to a railroad over a public street in a city, it is said in *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 331, 2 Sup. Ct. 728: "If, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road

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with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation." We think the language quoted states correctly the character of injury for which no action can be maintained. The judgment is reversed for proceedings consistent with this opinion.

MISSOURI, K. & T. RY. CO.

v.

WARD.

(Court of Appeals of Indian Territory, Jan. 8, 1898.)

Killing of Stock on Track—Negligence—Lookouts.*—In an action against a railroad company to recover the value of a bull killed by defendant's engine, the evidence tended to show that the engineer would have seen the animal in time to prevent the accident had he been on the lookout; and the defendant introduced no evidence. *Held*, that the jury were justified in returning a verdict for plaintiff.

APPEAL by defendant from the United States court for the Northern district of the Indian Territory.
Affirmed.

This was an action instituted on the 21st day of March, A. D. 1893, before Joseph G. Ralls, United States commissioner for the Second judicial division of the Indian Territory, at Atoka, by the plaintiff, alleging that on or about the 21st day of July, 1891, he was the owner of a certain red cherry bull, about 2½ years old, of the value of \$50, and that the defendant carelessly and negligently, and without fault on the part of plaintiff, by its servants and agents and train, struck said bull, and so injured the same that it died from the effects thereof; that said bull was injured on defendant's railroad about three miles north of Caddo, Ind. T.; whereupon the plaintiff prayed judgment for the

*See notes at end of case.

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sum of \$50 with interest thereon from the 21st day of July, 1892, and his costs. The defendant answered, denying all the allegations in the complaint. The case was tried before the commissioner, and judgment rendered for the sum of \$35 and costs in favor of the plaintiff. Defendant appealed.

On February 1, 1894, the defendant moved for a change of venue from the Second to the First judicial division of the Indian Territory; and on June 23, 1896, the case was tried before a jury, who returned a verdict for the plaintiff, and assessed his damages at the sum of \$40. Defendant moved for a new trial, and the same was overruled; whereupon judgment was rendered upon the verdict, and the defendant appealed to this court, and on the 12th day of October, 1896, filed its bill of exceptions in the United States court for the Indian Territory, Northern Judicial district. From the bill of exceptions it appears the testimony of all the witnesses was preserved, and the defendant, by its counsel, requested the court to give certain instructions to the jury, which requests were overruled by the court, and the court thereupon proceeded to instruct the jury as follows: "The court instructs the jury that the right of the plaintiff to recover in this case rests upon the proof of negligence on the part of defendant company's employees. If there be no proof of such negligence, you will find for defendant. The court instructs the jury that there is no obligation upon said defendant company to fence the track, and, if the track not being fenced was the cause of the injury, then you can not find for plaintiff. Now, if you find that defendant's servants and employees, in operating its trains and engine, failed to exercise ordinary care to discover the animal on the track, and to avoid injuring it after it was discovered, and that said failure caused the injury, then you will find for plaintiff. If the evidence fails to show that the defendant's employees were lacking in ordinary care, ordinary care meaning that care which a reasonably prudent man would use under like circumstances with like agencies, then you will find for defend-

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ant. The burden of proof is on the plaintiff to establish his right to recover. If he has failed to show negligence, or if the evidence is evenly balanced with the defendant, find for the defendant, for negligence must be shown on the part of the defendant. You are the judges of the weight of the evidence and the credibility of the witnesses. Take a standard which is the care that an ordinarily prudent man would exercise. Apply that standard to the proof in this case. If it shows that the employees failed to exercise that care, find for plaintiff. If the proof falls short of showing that they failed to exercise that care, find for defendant. If you find for plaintiff, find for a reasonable market value of the animal."

Clifford L. Jackson, and Joseph M. Bryson, for appellant.

Z. T. Walrond and J. H. Gordon, for appellee.

TOWNSEND, J. (after stating the facts). The evidence in this case shows the bull was killed by an engine or train in the night, and that, at the point where he was killed, the track was clear for a distance of 50 feet on each side of the track, and that the bull could have been seen for a distance from a quarter to one-half of a mile by the engineer had he been on the lookout. These circumstances tended strongly to show negligence, and from which we think the jury could rightfully infer negligence. We think this evidence was properly allowed to go to the jury, and under the charge of the court, which, in our opinion, states the law correctly, the jury were justified in returning a verdict for the plaintiff. The defendant introduced no evidence whatever, and, if there were any circumstances in its favor, the information was all with them. "It is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced,

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instead of rebutting, would support, the inferences against him, and the jury is justified in acting upon that conclusion." *Railway Co. v. Ellis*, 10 U. S. App. 643, 4 C. C. A. 454, and 54 Fed. 481. All the questions set forth in the specifications of error have been fully decided in the United States court of appeals in the foregoing cited case, and in the following cases: *Railway Co. v. Johnson*, 10 U. S. App. 629, 4 C. C. A. 447, and 54 Fed. 474; *Railway Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, and 49 Fed. 347; *Railway Co. v. Elledge*, 4 U. S. App. 136, 1 C. C. A. 295, and 49 Fed. 356. The judgment is therefore affirmed.

SPRINGER, C. J., and CLAYTON and THOMAS, JJ.,
concur.

NOTES.

Stock on Track—Care Due from Railroad Companies—Lookouts.
—See *Louisville & N. R. Co. v. Bowen*, 9 Am. & Eng. R. Cas., N. S., 276 and *foot-note*; *Roberds v. Mobile & O. R. Co.*, 7 *Id.* 93 and *foot-note*; and *Kirk v. Norfolk & W. R. Co.*, 4 *Id.* 105.

The servants of a railroad company are bound to use ordinary precaution to discover the presence of cattle on the track, as well as to avoid injuring them when they are discovered; and if they fail in this duty, the company is liable for their negligence. *Washington v. Baltimore, etc., R. Co.*, 17 W. Va. 190, 10 Am. & Eng. R. Cas. 749; *Blaine v. Baltimore, etc., R. Co.*, 9 W. Va. 252; *Kerwhacker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172; *Cleveland, etc., R. Co., etc. v. Elliott*, 4 Ohio St. 474; *Trowe v. Vermont Central R. Co.*, 21 Vt. 487; *Johnes v. North Carolina, etc., R. Co.*, 70 N. Car. 626; *Cincinnati, etc., R. Co. v. Smith*, 22 Ohio St. 244; *Baylor v. Baltimore, etc., R. Co.*, 9 W. Va. 271; *Louisville, etc., R. Co. v. Wainscott*, 3 Bush (Ky.) 109; *Kendig v. Chicago, etc., R. Co.*, 79 Mo. 207, 19 Am. & Eng. R. Cas. 493; *Carlton v. Wilmington, etc., R. Co.*, 104 N. Car. 365, 40 Am. & Eng. R. Cas. 178; *Kansas City, etc., R. Co. v. Watson*, 91 Ala. 483; *East Tennessee, etc., R. Co. v. Bayliss*, 74 Ala. 150, 19 Am. & Eng. R. Cas. 480; *East Tennessee, etc., R. Co. v. Watson*, 90 Ala. 41; *Western R. Co. v. Lazarus*, 88 Ala. 453; *Alabama, etc., R. Co. v. Jones*, 56 Ala. 507; *East Tennessee, etc., R. Co. v. Bayliss*, 75 Ala. 466, 22 Am. & Eng. R. Cas. 596; *East Tennessee, etc., R. Co. v. Bayliss*, 77 Ala. 429; *Toledo, etc., R. Co. v. Ingraham*, 58 Ill. 120; *note*, 40 Am. & Eng. R. Cas. 176.

The Supreme Court of Kansas, speaking through HORTON, C. J., says: "If the employees of the railroad company could, by the use of ordinary prudence, see, or seeing the stock on the track could, without danger, stop the train and avoid striking the animal, they were required to do so, because the idea is not tolerable that an injury

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may be inflicted which by the use of ordinary care and diligence may be avoided." *Missouri Pacific R. Co. v. Wilson*, 28 Kan. 637, 11 Am. & Eng. R. Cas. 447. (Citing *Railroad Co. v. Caffman*, 38 Ill. 425; *Railroad Co. v. Lewis*, 58 Ill. 49; *Railroad Co. v. Phillippi*, 20 Kan. 9; *Railroad Co. v. Rice*, 10 Kan. 426.) This opinion was quoted and approved in *Missouri Pacific R. Co. v. Gedney*, 44 Kan. 329, where it was held that it was not enough for the engineer and fireman to use diligence in driving away animals that are discovered on the track, but that they should keep a "vigilant lookout and exercise ordinary diligence" to discover and frighten away animals that are dangerously near the track. To the same purpose, see *Carlton v. Wilmington, etc., R. Co.*, 104 N. Car. 365, 40 Am. & Eng. R. Cas. 178; *Wilson v. Norfolk, etc., R. Co.*, 90 N. Car. 69, 19 Am. & Eng. R. Cas. 453. "A watchful lookout must be steadily maintained for the discovery of obstructions on the track; and it is no excuse for the railroad that the obstruction was not discovered, if by prudent watchfulness it could have been discovered. Failure to maintain a steady lookout is itself culpable negligence," but "infallibility is not attainable, and the impossible need not be attempted." *Mobile, etc., R. Co. v. Caldwell*, 83 Ala. 196. In other cases it is held that the engineer is not required to keep his eye steadily on the track before him to the neglect of his other equally imperative duties. *East Tennessee, etc., R. Co. v. Bayliss*, 75 Ala. 466, 22 Am. & Eng. R. Cas. 596; *Howard v. Louisville, etc., R. Co.*, 67 Miss. 247; *Louisville, etc., R. Co. v. Ballard*, 2 Metc. (Mass.), 177. A Tennessee statute requires all railroad companies "to keep the engineer, fireman, or some one else, always on the outlook ahead when the train is in motion," and, while the statute has been construed and enforced with great strictness, it has been held that it was sufficient for the railroad company to prove that the statutory precaution was being observed *at the time of the accident*, and that no recovery could be had for failure to keep the lookout over the whole length of the road. *Louisville, etc., R. Co. v. Stone*, 7 Heisk. (Tenn.) 468.

Even where animals are wrongfully upon the track, through the neglect of the owner, the railroad company may be liable for injury to such animals by reason of the negligence of the engineer in failing to keep a proper lookout. *Bemis v. Connecticut, etc., R. Co.*, 42 Vt. 375. See, also, *Illinois Central R. Co. v. Middlesworth*, 46 Ill. 494, overruling *Central Military Tract R. Co. v. Rockfellow*, 17 Ill. 541, and declaring that the company was liable for injury on account of failure to keep a lookout, although the trespassing stock had broken through the railroad fence. See, *contra*, *Stacy v. Winona, etc., R. Co.*, 42 Minn. 158, 40 Am. & Eng. R. Cas. 217, where it was held that the employees were not bound to anticipate the presence of cattle on the track where the right of way was properly fenced.

In Arkansas, railroad companies are not required to keep a lookout for cattle on the track, on the ground that the cattle are trespassers. *Memphis, etc., R. Co. v. Kerr*, 52 Ark. 162, 40 Am. & Eng. R. Cas. 171; *Kansas City, etc., R. Co. v. Kirksey*, 48 Ark. 366; *Kansas City, etc., R. Co. v. Shaver* (Ark.) 14 S. W. Rep. 864.

In Ohio, etc., *R. Co. v. Clutter*, 82 Ill. 123, it is held that it is negligence for a railroad company to permit weeds or grass to grow on its grounds, so as to obstruct the view of the engineer, and that the company is liable for damages to stock resulting from such negligence. See, also, *Indianapolis, etc., R. Co. v. Smith*, 78 Ill. 112.

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But the opposite doctrine is held by the Arkansas courts. See *Kansas City, etc., R. Co. v. Kirksey*, 48 Ark. 366.

In any case, the question whether or not the railroad employees have been guilty of negligence in not keeping a proper lookout is for the jury to determine. *Carlton v. Wilmington, etc., R. Co.*, 104 N. Car. 365, 40 Am. & Eng. R. Cas. 178; *Mobile, etc., R. Co. v. Caldwell*, 83 Ala. 196; *Kent v. New Orleans, etc., R. Co.*, 67 Miss. 608.

In *Louisville & N. R. Co. v. Posey* (Ala., June 27, 1892), 11 So. Rep. 423, it was held, under the code providing that a railroad engineer "must * * * on perceiving any obstruction on the track, use all the means within his power, known to skilful engineers, such as applying brakes and reversing engine, in order to stop the train;" that the duty to take precautions against inflicting injuries upon live-stock arises not only when the engineer of a moving train sees an animal on the track, or in dangerous proximity thereto, but also when, by the exercise of due diligence, he might have seen it, and that a failure in either of these respects is negligence.

In *Birmingham Mineral R. Co. v. Harris*, (Ala., June 17, 1893,) 13 So. Rep. 377, in an action against a railroad company for injury to stock, it was held proper to charge the jury "that after it was shown the plaintiff's mules were killed on defendant's railroad by a moving train, the burden of proof was on the defendant to show that it was not negligent in respect to a lookout."

In *Birmingham Mineral R. Co. v. Harris*, (Ala., June 17, 1893,) 13 So. Rep. 377, it was held in an action against a railroad company for damage to stock that it was improper for counsel to ask the question "Did you see the mules as soon as the light of the engine permitted you to see them?" because it ignored the maintenance of a proper outlook.

In *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. Rep. 481, it was held that it was the duty of an engineer of a railroad train to keep a lookout for stock upon the track. See *Railway Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, 49 Fed. Rep. 347; *Railway Co. v. Johnson*, 54 Fed. Rep. 474.

In *Lighthouse v. Chicago, M. & St. P. R. Co.*, (S. Dak., Feb. 15, 1893) 54 N. W. Rep. 320, it was held, in an action for killing stock trespassing upon defendant's right of way, that the jury was not obliged to accept as conclusive the positive evidence of the engineer that, although he was looking forward along on the track, he did not see such stock until within 25 or 30 feet of them, if they believe from other evidence that at the time of the accident it was so light as to render such statement improbable.

And see generally as to the obligation of railroad employees to keep a lookout for animals upon the track, *Memphis & L. R. Co. v. Kerr* (Ark.) 40 Am. & Eng. R. Cas. 171, *note*, 173, 176; *Missouri Pac. R. Co. v. Gedney* (Kan.), 45 Am. & Eng. R. Cas. 492, *note* 495, *note* 49 Am. & Eng. R. Cas. 549; *McMaster v. Montana Union R. Co.* (Mont.) 49 *Id.* 564.

Presumption of Negligence Arising from Mere Proof of Injury to Stock.—See *Davis v. Florida Cent. & P. R. Co.*, 5 Am. & Eng. R. Cas., N. S., 324, and extensive *note*, 326 *et seq.*

Western & A. R. Co. v. Calhoun

WESTERN & A. R. CO.

v.

CALHOUN.

(Supreme Court of Georgia, May 26, 1898.)

Injury to Stock on Track—Damages—Evidence.—In the trial of a suit against a railroad company for damages sustained by the killing of a horse, it is not error to exclude evidence offered by the defendant, to the effect that the witness had seen good mules sold for a sum less than the amount claimed by the plaintiff for his horse, and that such mules had within two or three years been sold for a much larger sum, and that he had also seen other horses and mules sold at the same rate, it not appearing at what place the sales occurred; such evidence being offered as original evidence to show the value of the horse in question, and not as reasons of the witness for the opinion given as to the value of the horse.

Same—Interest.*—In the trial of a case of the character above described it was error for the judge to charge the jury that, after ascertaining the market value of the horse killed, they should add interest from the "time of the judgment of the court below" to the time of the verdict.

Same.—The verdict in the present case having been returned for a given amount, with interest from a certain date, and the evidence being sufficient to authorize the finding, so far as the value of the animal was concerned, and the sum so found being the full amount sued for, direction is given that the part of the verdict and judgment finding interest be written off, and that the costs of this writ of error be taxed against the defendant in error.

(Syllabus by the Court.)

ERROR by defendant from Catoosa county superior court. *Affirmed.*

Payne & Tye and R. J. & J. McCamy, for plaintiff in error.

Payne & Payne, for defendant in error.

COBB, J. Plaintiff brought suit in the justice's court against defendant, a railroad company, for damages sustained by its negligently killing a mare belonging to him. The amount claimed was \$75.

Case Stated.

The case came on to be tried on an appeal in the superior court, and resulted in a verdict for the

*See notes at end of case.

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plaintiff for \$75 principal and interest from the date of the appeal bond. Upon the trial the liability of the defendant was admitted, and the sole question submitted to the jury was the value of the property destroyed. The defendant made a motion for a new trial upon grounds hereinafter referred to, which being overruled, it excepted.

1. The following testimony of Thomas J. Bryant, offered in behalf of the defendant was excluded: "I saw two mules—good ones—sell for fifty dollars in the year 1895, that had within two years prior been sold for two hundred and fifty dollars for the pair. When they sold for fifty dollars each they were worth fully one hundred dollars each in ordinary times. I saw other horses and mules sell at same rate during the year 1895." Testimony of other witnesses to the same effect, offered by the defendant, was also excluded. We do not think there was any error in excluding this testimony. In the first place, the testimony does not disclose where the mules and horses about which the witness testifies were sold. Even if evidence of this character is admissible at all, it is only admissible where the sales of the property are of similar character, surrounded by practically the same conditions as the property the value of which is under investigation. In the second place, it does not appear what was the relative difference between the price of the horses and mules referred to by the witness. When the question under investigation is the value of a horse, testimony as to the value of a mule is generally not relevant. In the third place, it does not appear that the evidence was offered as reasons for the opinion given as to the value of the horse which had been killed. If the witness had testified that in his opinion the value of the horse was a given amount, then the facts stated in the testimony which was excluded would probably have been admissible as reasons why he arrived at the opinion which he had given.

2. The court charged the jury as follows: "After

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you find the market value of the mare killed at the time she was killed, you should add to this interest from the time of the judgment of the court below." We think this charge was error. While, in cases of this character, the jury are authorized to increase the damages found by addition of interest from the time that the property was damaged or destroyed, they are not compelled to do so. This is the rule laid down by this court in numerous cases. See *Railroad Co. v. Sears*, 66 Ga. 499; *Railroad Co. v. McCauley*, 68 Ga. 818.

3. As the evidence was sufficient to authorize the jury to find the value of the animal to be the amount returned in the verdict as principal, this error will not necessitate a new trial; but the amount found as interest must be written off. Especially would this be true in the present case, where the amount found was the full sum sued for; and, even if interest had been properly returned, it would have been necessary to write it off in any event. *Railroad Co. v. Crawley*, 87 Ga. 191, 13 S. E. 508. Direction is therefore given that the judgment be affirmed as to the amount described in the verdict as principal, and that the verdict and judgment be so amended as to strike therefrom so much as relates to the subject of interest, allowing the judgment to stand for the sum of \$75; the costs of this writ of error, and all costs which have accrued in the trial court since the rendition of the verdict to be taxed against the defendant in error. Judgment affirmed, with directions. All the justices concurring.

NOTE.

Injury to Stock—Damages—Interest—(1) When Recoverable.—Interest is recoverable as part of the damages in an action against a railroad for killing cattle. *St. Louis, I. M. & S. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. Rep. 724.

Where cattle are killed through a failure of the company to maintain proper cattle-guards, it is liable for their value with interest. *Lackin v. Delaware & H. C. Co.*, 22 Hun (N. Y.) 309.

Note

Interest on the value of stock lost or destroyed through the negligence of a railway company may be included in damages. *Varco v. Chicago, M. & St. P. R. Co.*, 11 Am. & Eng. R. Cas. 419, 30 Minn. 18, 13 N. W. Rep. 921.

In an action for the value of a horse killed by a railroad, interest may be recovered on the value of the animal from the time of the accident. *Baltimore & O. R. Co. v. Schultz*, 22 Am. & Eng. R. Cas. 579, 23 Am. & Eng. R. Cas. 211, 43 Ohio St. 270, 54 Am. Rep. 805, 1 N. E. Rep. 324.

In an action for killing stock, an instruction to the jury that if they found in favor of plaintiff they should return a verdict for the value of the stock which they might ascertain, with interest from the date of the loss to the time of the trial, correctly states the law. *Alabama G. S. R. Co. v. McAlpine*, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.

Where a horse is killed by the negligent operation of a railroad, the measure of damages is his value when killed, with interest to the time of recovery. *St. Louis, I. M. & S. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. Rep. 724.

Where plaintiff recovers from a railroad company the value of a horse killed by the train he is entitled to interest from the time the suit was instituted. *Woodland v. Union Pac. R. Co.*, (Utah) 26 Pac. Rep. 298.

An instruction that if the plaintiff's cow escaped from the plaintiff's field through a defect in the fence which it was the duty of the defendant to erect and maintain, and such defect was an open, visible one, existing for some time before the killing of the cow, the plaintiff was entitled to recover for the killing; and interest on the value of the animal was proper. *Jebb v. Chicago & G. T. R. Co.*, 31 Am. & Eng. R. Cas. 532, 67 Mich. 160, 10 West. Rep. 905, 34 N. W. Rep. 538.

(2) When not Recoverable.—In fixing the amount of damages under a suit for killing live stock, interest is not recoverable *eo nomine*, but the jury may consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may, in their discretion, increase the amount of the damages allowed accordingly. *Western & A. R. Co. v. McCauley*, 68 Ga. 818.

The owner of stock killed by a railway for want of a fence is not entitled to interest on its value from the time of killing. *Toledo, P. & W. R. Co. v. Johnston*, 74 Ill. 83.

Plaintiff is not entitled to the interest on his damages prior to the finding of the verdict; and it was error to instruct the jury that they might include interest at six per cent. *Brentner v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 448, 68 Iowa 530, 23 N. W. Rep. 245, 27 N. W. Rep. 605.

In the absence of any statutory provision in Kansas allowing interest in actions against railroads for stock killed it is not recoverable. *Atchison, T. & S. F. R. Co. v. Gabbert*, 22 Am. & Eng. R. Cas. 621, 34 Kan. 132, 8 Pac. Rep. 218.

Under the Kansas railroad stock law of 1874, in an action for the value of an animal killed by the company in the operation of its railroad—*held*, that the plaintiff can recover only what the statute permits him to recover, and cannot recover interest on the value of

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the animal killed prior to the day of trial. Atchison, T. & S. F. R. Co. v. Gabbert, 22 Am. & Eng. R. Cas. 621, 34 Kan. 132, 8 Pac. Rep. 218.

In an action against a company for negligently killing stock, interest is not allowable for the time between the date of the killing and that of the recovery. Meyer v. Atlantic & P. R. Co., 64 Mo. 542, 17 Am. Ry. Rep. 249.

Under the Texas statute the measure of damages for stock killed is limited to the value of the stock, or to the amount of the injury, where they are not killed, and in neither case is interest allowable. Houston & T. C. R. Co. v. Muldrow, 54 Tex. 233.

LOUISVILLE & N. R. Co.

v.

WILLIAMS.

(Court of Appeals of Kentucky, March 26, 1898.)

Killing Horse on Track—Charter Provision as to Limitations—Repeal.*—A provision of a railroad charter requiring actions against it for injuries to stock to be brought within six months after the accident may be repealed by statute.

Same.—Such provision of defendant's charter has not been repealed by the general statutes of Kentucky.

APPEAL by defendant from Knox county circuit court. *Reversed.*

Wilson & Rawlings, J. A. Mitchell, and J. W. Alcorn, for appellant.

Dishman & Hays, for appellee.

PAYNTER, J. The petition was filed on the 14th day of May, 1894, in which it is averred that on the ——— June, 1893, the train of the appellant ran over and killed a mare belonging to the plaintiff and one Hamons, of the value of \$105; Case Stated. that it was the result of the negligence of those in charge of the train, etc. The action was not brought within six months after the mare was killed. There is a provision in the charter of the appellant which requires actions like this to be brought within six months after the accident.

*See note at end of case.

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Two questions are involved in this case: (1) Has the legislature the right to repeal that provision of the charter of the appellant which requires the owner of stock killed by the negligence of the appellant, its employees or servants, to bring the action therefor within six months after the stock had been killed? (2) Has that provision of the charter of the appellant which requires such action to be brought within six months been repealed?

Assuming (without so deciding) that the railroad company has irrevocable charter rights, still that provision of the charter which requires an action to be brought within six months for injury to stock is not one of them. It is a question for the state to determine as to what is the best policy in the matter of prescribing the time in which actions must be brought. It is purely a question of remedy, that can be altered or changed at the pleasure of the legislature. To do so does not materially interfere with the substantial enjoyment of the rights which have been granted the corporation. It was ruled in *Howard v. Insurance Co.*, 13 B. Mon. 282, that the remedy may be changed by the legislature if the obligation of the contract is not thereby impaired. It was said in *Insurance Co. v. Needles*, 113 U. S. 580, 5 Sup. Ct. 681: "Equally implied in our judgment is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state had granted, and serve only to secure the ends for which the corporation was created. *Sinking Fund Cases*, 99 U. S. 700, 768; *Com. v. Farmers' & Mechanics' Bank*, 21 Pick. 542; *Commercial Bank of Rodney v. State*, 4 Smedes & M. 497, 503." In *Terry v. Anderson*, 95 U. S. 633, the court said: "This court has often decided that statutes of limitations affecting existing rights are not unconstitutional if a reasonable time is given for the commence-

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ment of an action before the bar takes effect. *Hawkins v. Barney*, 5 Pet. 457; *Jackson v. Lamphire*, 3 Pet. 280; *Sohn v. Waterson*, 17 Wall. 596; *Christmas v. Russell*, 5 Wall. 290; *Sturges v. Crowninshield*, 4 Wheat. 122. It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and, as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain." It was held in *Railway Co. v. King*, 81 Ky. 221, that a special remedy given to a railway company for the condemnation of real estate may be repealed by a general act applying to all railroads, and that there is no element of a contract in a special remedy.

In the former opinion delivered in this case the court's attention was not called to some decisions of this court on the question as to whether the six-months limitation provisions of the appellant's charter and similar charters were in force after the adoption of the General Statutes. The court's attention was only called to the cases of *O'Bannon v. Railroad Co.*, 8 Bush, 352, and *Mortimer v. Railroad Co.*, 10 Bush, 486, in which the court adjudged valid the charter provisions requiring actions to be brought within six months after the stock was killed. The General Statutes were not in force when the causes of action arose in those cases. In *Lucas v. Railroad Co. (Ky.)* 14 S. W. 965, the court, in passing upon a charter provision which required an action for killing stock to be brought within six months, said: "This case originated in a magistrate's court in Covington, and involves the value of a horse killed, as is alleged, by the negligence of the employees of

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the railroad company. A constitutional question has been raised as to that clause of appellee's charter fixing the limitation of actions for killing stock on its track at six months. This plea of limitation defeated the recovery. We perceive no reason why the act is in violation of the constitution. Various causes of action exist by reason of legislation against railroad companies that cannot be maintained against a natural person. The rules of evidence have been changed, as applied to this class of companies, by placing the burden on the company to relieve itself of a *prima facie* case arising from the act of killing, although the stock is trespassing on the road of the appellee. These provisions have been held constitutional, and it seems to us there is nothing in the objection made. The original road, brought into existence by the act of incorporation, was sold with all of its rights, franchises, immunities, etc.; and, passing to the purchaser, he became invested with the rights of the old corporation, including the right to interpose the plea of limitation as a bar to the recovery." In *Stuart v. Railroad Co.*, 10 Ky. Law Rep. 542, the superior court said: "We are of the opinion that the provisions of appellee's charter limiting actions against it for injuries to stock straying upon its track, and inflicted by the engine and cars, to six months, is still in force." In *Railroad Co. v. Bowen* (Ky.) 39 S. W. 31, the provisions of the charter of the appellant in relation to limitation of actions for injuring or killing stock were recognized to be in force. All these causes of actions arose under the General Statutes. While the court in these cases did not discuss the question as to whether the charter provisions relating to limitations had been repealed by the General Statutes, still it recognized that they were in force. In view of these decisions, we deem it unnecessary to enter into a discussion as to whether the General Statutes repealed the provisions of the charter of the appellant which we have been considering. More than six months had elapsed from the time the mare was killed to the institution of this

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action ; hence the statute of limitation was available as a defense to the action. The judgment is reversed for proceedings consistent with this opinion.

NOTE.

Corporate Franchises Subject to Legislation Affecting Remedies.—The fact that the grant of franchises to a corporation constitutes a contract has been set up as rendering unconstitutional legislation having for its object the advancement of justice in altering legal remedies by or against corporations. But it is well settled that remedies for the security of their rights, and to compel discharge of their liabilities, as to the mode, the time when, and the courts where they should be enforced are not in any way placed beyond legislative control. *Gowen v. Penobscot, etc., R. Co.*, 44 Me. 145; *Read v. Frankfort Bank*, 23 Me. 318; *Franklin Bank v. Cooper*, 36 Me. 179; *Baltimore, etc., R. Co. v. Nesbit*, 10 How. (U. S.) 395; *United States v. Union Pacific R. Co.*, 98 U. S. 569; *Terry v. Anderson*, 95 U. S. 628; *Penniman's Case*, 103 U. S. 714; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574; *Commonwealth v. Cochituate Bank*, 3 Allen (Mass.), 42; *Commonwealth v. Farmers' etc., Bank*, 21 Pick. (Mass.) 542; *Foster v. Essex Bank*, 16 Mass. 245; *Attorney Gen. v. North America, etc., Ins. Co.*, 82 N. Y. 172; *Bank of Columbia v. Okely*, 4 Wheat (U. S.) 535.

This principle has been applied where a three years limitation in a railroad charter as the time within which suit for damages for land taken might be brought was extended. *Gowen v. Penobscot, etc., R. Co.*, 44 Me. 145.

SCHAEFER

v.

CITY OF FOND DU LAC.

(Supreme Court of Wisconsin, April 12, 1898.)

The street-railway company in the defendant city so constructed and maintained its railway track on one of the streets of such city as to render such street defective and dangerous for public travel. While such condition existed, Elihu Colman, with knowledge of the facts, purchased the railway track and left the same in possession of the railway company under an option to purchase the property, but without any agreement binding the railway company to remedy the defective condition of the street. While such condition of things existed, the plaintiff lawfully traveling on such street at the point of danger, without fault on his part, was injured by reason of such condition. Plaintiff thereafter gave due notice of his injury to the defendant city, and thereafter prosecuted an action against the railway company to judgment, for his damages. The company, pending the suit, notified the defendant herein of the action, in order that it might defend the same. After exhausting all legal

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remedies against such company, plaintiff sued the defendant city, setting up the proceedings in the first suit and the fact of failure to collect the damages from the railway company after exhausting all legal remedies to that end. In the second suit it was claimed that the defendant city was bound by the judgment in the first suit, as to the defective condition of the street, the happening of the accident, and the amount of damages. Defendant pleaded and insisted, among other things, that Elihu Coleman was primarily liable for the damages, and that the exhaustion of all legal remedies against him was a condition precedent to the right of plaintiff to proceed against the defendant city. Plaintiff recovered judgment, but for a less sum than in the first suit, the court holding that Colman was not primarily liable and that defendant was not bound by the former proceedings. On appeals by both parties, *held* :

Lease of Street Railway—Defective Track—Liability of City.—That Colman and the railway company as well, were primarily liable to plaintiff, and that the exhaustion of all legal remedies as to both was a condition precedent to the right of plaintiff to proceed against the city under the charter thereof, which provides that in such cases the city shall not be liable till all legal remedies shall have been exhausted to collect the damages from the person or corporation whose wrong or neglect produced or caused the defective condition of the street.

Same—Statutory Right of Action—Construction of Statute.—That the right to recover of the city is a creature of the statute, hence the legislature may grant the right, take it away, or make the exercise of it contingent upon the performance of such conditions as in its wisdom may be deemed best, and without any warrant for holding that the law in that regard is unreasonable. Such legislation being in derogation of the common law, should be construed most favorably to the public corporation, and not the claimant for damages.

Same—Liability of Lessor.*—If property, when in such defective condition as to be dangerous to persons lawfully in the vicinity thereof, be purchased by a person with knowledge of the facts, who leases it to another, especially if the lease does not contain a clause requiring the lessee to remedy the defects, and a person so lawfully in the vicinity of such danger, but having no connection whatever with such lessee, be injured thereby, such lessor is liable to such injured party; he cannot escape liability from the mere fact of the lease to, or possession by, such other person.

Same—Indemnitor and Indemnatee—Effect of Judgments Against.—The doctrine that where a person against whom suit is brought to recover damages is entitled to indemnity from another in case of being compelled to pay such damages, such other is bound by the judgment against such person if he be notified of the pendency of the suit and has an opportunity to defend against the same, does not apply to the facts of this case. The judgment against the indemnatee in such a case is binding on the indemnitor, but if the latter be first sued the judgment in a subsequent suit by the same plaintiff against the indemnatee will not affect the plaintiff as to any question litigated in such first suit.

(Syllabus by the Judge.)

*As to liability of a lessor railroad company for injuries resulting from defects in construction, see 7 Am. & Eng. R. Cas., N. S., *note*, 665.

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Cross-appeals by both parties from Fond du Lac county circuit court. *Reversed.*

Action to recover compensation for personal injuries alleged to have been caused by a defective street in the city of Fond du Lac. The date of the injury was June 25, 1895. The defective character of the street grew out of the manner in which the street-car track was originally constructed, and was maintained, in the street in question. The Fond du Lac Light, Power & Railway Company constructed the track, owned it till the 28th day of December, 1895, and operated the railway up to and inclusive of the time of the injury. Suit was first brought against the company, and such proceedings were had therein that all the facts requisite to a recovery were found in plaintiff's favor. The damages were assessed at \$2,063.21. Judgment was entered accordingly, on which execution was duly issued and returned unsatisfied. After the action was brought against the railway company it notified the city of Fond du Lac, of the pendency of the action in order that the city might defend the same. After the return of the execution aforesaid, this suit was commenced. The complaint contained appropriate allegations to make a cause of action, including appropriate allegations to show that plaintiff had exhausted his legal remedy against the railway company, which was claimed to be the person primarily liable for the injury. The amount recovered in the first case was duly set forth in the complaint. The defendant answered, taking issue on the allegations in regard to the sufficiency of the street, the cause of the injury, and the amount of the damages. It also contained allegations to the effect that Elihu Colman was the owner of the road at the time of the accident, and a person primarily liable for the injury, and that no effort had been made to collect of him. On the trial there was evidence tending to prove the allegations of the complaint in respect to the defective condition of the street, the injury, the damages, the action against the street-railway company as the party primarily liable, and the

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amount recovered in such action. Proof was made also of the other allegations of the complaint, requisite to entitle plaintiff, *prima facie*, to recover. The evidence showed that plaintiff was endeavoring to drive his team across the track, he standing on a high load of lumber; that he had a stake in a fixed position, where he could take hold of it to steady himself; that when his wagon struck the defects in the street he was suddenly jerked and compelled to take hold of the stake, which broke, and he was precipitated to the ground, causing the injuries complained of. The evidence tended to show that the defective condition of the street existed on the 28th day of December, 1894, and continuously thereafter up to the time of the accident; that on the day named the street-railway track, as it lay in the street, and the road-bed, and some other property of the company, was duly conveyed by sheriff's deed to Elihu Colman, but that there was a verbal understanding between him and the street-railway company that it was to have the property back upon complying with certain conditions of purchase; that it continued to operate the road after the sale to Colman, till after the happening of the injury to plaintiff, under an option to purchase the property; that the option was never accepted, and that Colman finally took up the track. On the evidence the defendant moved the court for a verdict in its favor, which was denied, and the ruling duly excepted to. A special verdict was thereupon ordered on defendant's motion. The jury found that June 25, 1895, at the time the plaintiff was injured, Main street, where the injury occurred, was in an unsafe condition for travel; that plaintiff was thrown from his wagon and injured in consequence of such defective condition of the street; that the city had notice of such defective condition of the street for a sufficient length of time, by the exercise of reasonable care and diligence, to have discovered and remedied the defects; that the plaintiff was free from contributory negligence; that he was damaged to the extent of \$800; that notice of the injury was given to the proper officers of the defendant as required by law. The

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jury also found, by order of the court, that the defective condition of the street was not caused by, nor did it arise from, any wrong, default or negligence of Elihu Colman. Defendant's counsel moved the court to set the verdict aside and grant a new trial, which was denied. Plaintiff moved the court for judgment for the amount due upon the judgment in the first action, which was denied. Judgment was thereupon perfected for \$800 and costs. Both parties appealed.

E. S. Bragg, for plaintiff.

E. W. Phelps, for defendant.

MARSHALL, J. (after stating the facts.) At the outset, the question of the liability of Elihu Colman is of paramount importance. It stands without question on the record that he was the owner of the street-car track at the time of the injury complained of, and had been such for several months prior thereto; that the defective condition of the street existed when he purchased the property; that he then knew of the facts; that the railway company occupied and used the property the same after such purchase as before, but pursuant to an option to buy it back, the particulars of which option were not testified to. The learned circuit judge decided as a matter of law, on such facts, that Colman was not liable for the injury to plaintiff, because the defects in the street were not caused by, nor did they arise from, or were they produced by, him. That reasoning hardly meets the facts of this case fully. It leaves out the element that Colman continued the defective condition of the street by allowing the railway company to hold under him without any covenant on its part to remedy such condition. With the added element, the decision has some support by some things said in *Fellows v. Gilhuber*, 82 Wis. 639, 52 N. W. 307, where the awning in front of an hotel was thrown down, partly through defects existing in one of the supporting posts, whereby a guest at the hotel, standing on the walk, was injured, the hotel being in possession of a lessee, and the defect existing with knowledge of the

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landlord when the lease was made. It was held that the lessor was not liable, but the decision was put on the ground that there was an agreement in the lease which obligated the lessee to repair. Upon that theory the decision is in accord with much authority in this country and England, but it must be said there is much authority of a very respectable character against it. Whatever is said in the opinion, however, that may be read to support the proposition that the rule that a landlord who leases dangerous premises, knowing, or with means of knowledge of such dangers, without any covenant to repair on the part of the lessee, is not liable to the tenant or sub-tenant holding under the first lessee, or any person having business connection with the property, under the tenant, injured by such dangers, applies to cases arising between the landlord and a mere stranger lawfully in the vicinity thereof, and injured thereby, must be considered as *obiter*, and the decision read as applying only to the facts of the particular case.

The law is firmly established by the great weight of authority, that as between the owner of leased property and a mere stranger, the owner is liable for an injury to the latter, caused by a dangerous defect in the property existing at the time of the lease, unless protected by a covenant binding the lessee to remedy such defects; and there is much authority that he is liable any way, that is, that he cannot shift the liability for known existing dangers onto the lessee by a covenant to repair. But there is no necessity for discussing the conflict in that regard in this case, for there is nothing in the record to indicate that the railway company was under any obligation to Colman to repair the defects in the street caused by the railway track. So far as appears from the evidence, the company continued in the possession of the property without any agreement other than a mere option to purchase.

Authorities which apply to the facts unfavorably to plaintiff are very numerous, and without substantial conflict. We will cite but a few of them. In

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Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co., 51 N. Y. 573, defendant demised premises, in a dangerous condition, and was held not liable for want of notice of the defects at the time of the demise, or thereafter, prior to the injury. In *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, defendants became the owners of a defective pier, subject to an outstanding lease which contained no covenant to repair. The defects antedated the lease. They were created and existed before the property came to the defendants. The court held that the defendants were not liable for the injury caused by such defects, though solely on the ground of want of notice. To the same effect are *Irvine v. Wood*, 51 N. Y. 224. and *Swords v. Edgar*, 59 N. Y. 28. In *Albert v. State*, 66 Md. 325, 7 Atl. 697, the following instruction given in the trial court was approved, the action being to recover damages sustained by a minor through the death of his parents, caused by a defective wharf occupied by the defendant's tenant: "If the jury find that the defendant was the owner of the wharf, and that he rented it out to the tenant, and at the time of the renting the wharf was unsafe, and that the defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, then the plaintiff is entitled to recover." To the same effect are *Knauss v. Brua*, 107 Pa. St. 85; *Cunningham v. Bank*, 138 Mass. 480; *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841; *Nugent v. Railroad Co.*, 80 Me. 62, 12 Atl. 797.

The rule appears to be very firmly established as above indicated, that under circumstances such as mentioned in the foregoing authorities, there being no covenant to repair or remedy defects, on the part of the tenant, the liability of the owner for injuries thereby received turns on knowledge, or reasonable means of knowledge, the existence of the defects on the part of such owner. Probably no case can be found that more nearly touches this at every point than *Dalay v. Savage*, *supra*. There the defendant purchased premises abutting on a public way, having a defective coal hole in the sidewalk appurtenant to the premises, which caused the injury. De-

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fendant had a right to the possession, but instead of asserting it, left the person in possession who was there at the time of the purchase, as a tenant at will, without any agreement to repair the coal hole. It was held that the defendant was liable.

Further citations appear to be unnecessary. The rule on which they proceed is quite elementary, and may be stated thus: If a person purchases premises which are in a defective condition, with knowledge, or reasonable means of knowledge, of the defects, and then leases the same to another, or allows such other to hold possession of such premises under such conditions as to indicate permission to continue the defects, and a third person having no connection with such other, without fault on his part, is injured by reason of such defects while rightfully in the vicinity of the danger, such purchaser is liable to respond in damages to such third person for such injury.

Same—Liability of
Lessor.

Applying the foregoing to this case, it must be held that Colman, by reason of his ownership of the property and knowledge of its dangerous condition when he purchased it, and up to the time of the injury complained of, was liable to the plaintiff. His allowing the railway company to remain in possession, especially without any agreement on its part to repair the street, did not operate to relieve him from responsibility. As said in *Dalay v. Savage*, *supra*, that the railway company was also liable, is no defense for Colman, who held the title and was the actual owner of the property.

There is nothing in the foregoing inconsistent with what was decided in *Fellows v. Gilhuber*, *supra*, or *Dowling v. Nuebling* (Wis.) 72 N. W. 871. In the latter case the contest was between the landlord and his tenant.

What has preceded leads to a consideration of whether Colman was a party "primarily liable" within the meaning of the charter of the defendant city, which provides that, "In case of injury or damages by reason of insufficient, defective or dangerous con-

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ditions of streets, not included in sidewalks, produced or caused by the wrong; neglect of duty, default or negligence of any person or corporation, such person or corporation shall be primarily liable for damages for such injury in a suit for the recovery thereof by the person sustaining such damages, and the city shall not be liable therefor until all legal remedies shall have been exhausted to collect such damages from such person or corporation." The words "primarily liable" have a very definite and certain meaning. The section in which they are used does not create the liability, nor is there any statute liability on the subject. *Toutloff v. City of Green Bay*, 91 Wis. 490, 65 N. W. 168; *Cooper v. Village of Waterloo*, 88 Wis. 433, 60 N. W. 714. They refer to the common-law liability that exists against the wrongdoer and renders him liable to the injured person, and over to the city in case of a recovery against it on the statutory liability, hence the words obviously include all persons liable at common law for the wrong. They would include persons made liable by statute as well, if any such existed. It is argued that such construction of the statute throws much embarrassment in the way of recovering from municipal corporations in such cases as this, because it requires great caution in order to bring into the first controversy all persons liable for the injury, other than the city, who are so circumstanced as to be liable to indemnify it. That is hardly a sufficient reason for adopting a different construction, even if the language were of doubtful meaning. There is no liability on the part of the municipal corporation at all, independent of the statute. The law creating the right being in derogation of the common law, is to be strictly construed in favor of the public corporation, not in favor of the claimant for damages. The section under consideration, while it regulates the remedy, bears on the right as well, hence comes within the rule stated. Taken in connection with the statute creating the municipal liability, it makes that con-

Same—Statutory
Right of Action—
Construction of
Statute.

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tingent on a previous exhaustion of all legal remedies against the persons or corporations whose wrong, neglect of duty, default or negligence, produced or caused the defective condition of the street. It is wholly in the power of the legislature to give the right or take it away, or make it contingent on the performance of such conditions precedent, as in the wisdom of legislative power seems best, and without any ground for contending that the legislation in that regard is unreasonable.

It follows from the preceding, on the undisputed evidence in the case, that plaintiff ought not to have recovered, because of failure to prove performance of the condition precedent, requiring plaintiff to exhaust all legal remedies against the persons primarily liable, before proceeding against the city. That condition was properly pleaded and insisted upon at the trial.

It is contended that the verdict was contrary to the evidence on the subject of contributory negligence. Any discussion of that appears to be unnecessary. Suffice it to say, however, that a consideration of the evidence preserved in the record, leads to the conclusion that the question was properly submitted to the jury.

It is further contended on plaintiff's appeal, that the court erred in not limiting the defendant in making its defense, on the theory that the recovery against the railway company was conclusive on the city as to the injury, the cause of it, the amount of damages, and notice to the city. That was pressed on the attention of this court with much earnestness and learning by the eminent counsel who argued the plaintiff's side of the case, and many authorities were cited in support of the position, all of which have been carefully considered, and none of which, in our judgment, fit the facts before us. The doctrine that where a person is responsible over to another who is sued, either by operation of law or express contract, and such person is duly notified of the pendency of the suit and requested to take upon himself the defense of it, the judgment is conclusive against him

Same—Indemnitor
and Indemnitee—
Effect of Judgment
against.

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whether he appears or not, is quite familiar. That is the doctrine which the learned counsel invoked to sustain his contention that the judgment against the railway company is binding on the defendant city. In *City of Boston v. Worthington*, 10 Gray, 496, recovery was first had of the plaintiff by the injured party; then such party sued the defendants for indemnity, they having created the danger which caused the injury. They were given notice and opportunity to defend in the first case, but declined to do so. The court held that they were bound by the judgment in such first case. In *Littleton v. Richardson*, 34 N. H. 179, plaintiff town was sued by a person who was injured by obstructions placed in the highway by another. Such other had an opportunity to defend. Recovery was had of the city, whereupon it sued such other for indemnity for the loss. There was the same situation in *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550, *Lowell v. Boston & L. R. Co.*, 23 Pick. 24, *Robbins v. City of Chicago*, 4 Wall, 657, and several other cases cited by counsel, and many more that might be added, in all of which it was held that the judgment in the first case was conclusive against the defendant in the second. It is clear that to make the doctrine under discussion apply the person first sued must have a right of action over against another for indemnity in case of loss. The conclusive character of the first judgment is only where the person first sued, himself becomes a plaintiff against the indemnitor, to recover over for the loss sustained by being compelled to pay in the first case. Here we are asked to apply it, not in favor of the indemnitee who has paid the loss, against the indemnitor, but against the indemnitee in favor of a person who had a right of action against both the indemnitor and the indemnitee. No precedent for that, we may safely venture to say, can be found in the books. Certainly, none was cited by counsel.

The result of the foregoing is that the trial court rightly held that the defendant was not concluded on any question in respect to its liability, by the judgment.

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in the action against the railway company, and erred in deciding that Colman was not a party primarily liable within the meaning of the city charter. Therefore both appeals must be decided in favor of the defendant, and the judgment reversed accordingly and the cause remanded for a new trial.

The judgment of the circuit court is reversed and the cause remanded for a new trial.

STATE *ex rel.* NOLAN, ATTY. GEN.,

v.

MONTANA RY. CO. *et al.*

(*Supreme Court of Montana, June 20, 1898.*)

Competing Lines—Definition.—The Montana Railway Company and the Butte, Anaconda & Pacific Railway Company are, with respect to each other, competing lines, their relation to one another enabling them to cut rates to principal or terminal points.

Same—Power to Lease—Consolidation.*—A lease for ten years by the first named company to the latter, its competitor, of all the lessor's property, right of way, etc., is not invalid, section 923 of the civ. code of Montana permitting such leases not being repugnant to the constitutional provision prohibiting the consolidation of competing lines.

Consolidation—Definition of.—A consolidation of corporations is a merger, a union or amalgamation, by which the stock of the two companies is made one, by which their property and franchises are combined into one, by which their names are merged into one, and by which the identity of the two practically, if not actually, runs into one.

PROCEEDING at the relation of the attorney general against the Montana Railway Company and the Butte, Anaconda & Pacific Railway Company. *Petition denied.*

C. B. Nolan, Atty. Gen., in *pro. per.*

W. W. Dixon, Wm. H. De Witt, and Wm. Scallon,
for defendants.

*See notes at end of case.

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HUNT, J. The attorney general has instituted this proceeding as an original one in this court, to have declared invalid and of no force and effect a certain contract of lease entered into between the Montana Railway Company and the Butte, Anaconda & Pacific Railway Company. Both of these railroad corporations are organized under the laws of this state, and operate railroads within Montana. The terms of the lease are substantially as follows: The Montana Railway Company leases to the Butte, Anaconda & Pacific Railway Company all the railway, including lands, right of way, buildings, tracks, turntables, yards, and all real property pertaining thereto lying between Stuart Junction and Anaconda, in the county of Deer Lodge. The lease is to commence May 1, 1898, and to run 10 years. The Butte, Anaconda & Pacific Railway Company agrees to pay to the Montana Railway Company an annual rental of \$25,000, in monthly installments. The Butte, Anaconda & Pacific Company covenants to keep the leased premises, including the tracks and all property pertaining thereto, in as good condition as the same were at the time the lease became effective. It is provided that the leased property shall at all times be operated by the Butte, Anaconda & Pacific Company in accordance with its charter and the laws, and all responsibilities of such operation shall be assumed by the lessee. The Montana Railway Company and the Northern Pacific Railway Company are to be at all times held harmless by the lessee for all acts or omissions that may occur in the operation of said property, except when the Northern Pacific Railway Company runs its own trains over the track of the Montana Railway Company, in which case the lessee is not to be responsible for accidents unless due to the defective track or negligence of the employees of the lessee. The Butte, Anaconda & Pacific Company covenants to pay all expenses of operation and maintenance of the leased property, and all taxes and assessments during the period of the lease. The Butte, Anaconda & Pacific Company further covenants that the business

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of the Oregon Short-Line Company, between Anaconda and all points reached by said Short-Line, or by way of the same, shall at all times be handled upon as favorable terms as are accorded to any other line, and that no discrimination shall be made against the business of the Oregon Short-Line, either in facilities accorded to it or the rates charged it, as compared with any other line doing business in Anaconda which passes over the Butte, Anaconda and Pacific tracks. All freight business to and from points east of Butte reached by the Northern Pacific Railway destined to or from Anaconda is to be interchanged at Butte between the Northern Pacific Railway Company and the Butte, Anaconda & Pacific Company, and the division of the revenues shall at no time during the continuance of the lease exceed the Butte, Anaconda & Pacific Company's divisions now effective between the Butte, Anaconda & Pacific Company and the Montana Central Railway Company, and shall at all times be as favorable to the Northern Pacific as to the Montana Central or Great Northern Railway Companies. The Northern Pacific is to have the right to run passenger trains to and from points east of Butte over the leased line between Stuart and Anaconda. Upon all joint business handled upon such trains the revenues shall be divided, and the division allotted the Butte, Anaconda & Pacific Company upon competitive business shall be the local fares of the Butte, Anaconda & Pacific Company from Butte to Anaconda, and upon noncompetitive business shall be the local fares from Stuart to Anaconda, as the same may be established from time to time, but at no time in excess of those existing at the time this lease becomes effective. The Butte, Anaconda & Pacific Company shall be entitled to receive all the local passenger fares received or collected on such Northern Pacific trains upon such leased line, or for tickets or passenger fares thereon between Butte and Anaconda. In consideration thereof no charge is to be made by the Butte, Anaconda & Pacific Company for the use of the leased tracks, or the facil-

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ities for the passenger business from Stuart to Anaconda except the fares of passengers as provided in the lease. Upon all joint freight business to and from stations upon the Northern Pacific Railroad or its connections west of Helena, Mont., to be interchanged at Stuart, the Butte, Anaconda & Pacific shall be allowed on car load freight \$3.50 per car load, and upon less than a car load 3 cents per 100 pounds; and upon passenger business its local fare, but not at any time in excess of 45 cents per passenger. The lease provides against discrimination against the business of the Montana Union or Northern Pacific Companies, interchanged with the Butte, Anaconda & Pacific Company at Butte or Stuart, or other points of connection, as compared with any other exchange of business existing between the Butte, Anaconda & Pacific Company and any other lines at the same or competing points. It is also agreed by the Northern Pacific that freight, passenger, and express rates between its eastern and western terminals and connections and Anaconda shall at all times be no higher than the rates between the same points and Butte, including the divisions agreed upon in the lease, or those allowed the Butte, Anaconda & Pacific Company by other competing lines. Provision is also made for an allowance in case the Northern Pacific should handle passenger or express traffic between Butte, Stuart, and Anaconda over the leased premises for its competitors or any other railroads. The lessee is to receive all revenue and pay for all mails carried between Stuart and Anaconda on Northern Pacific trains. The lease contains provisions whereby, if the lessee fails to perform the covenants or obligations of the contract, the lessor may, at its option, terminate the lease, and repossess itself of the leased premises. The contract is also binding upon the successors and assigns of the party bound, and shall inure to the successors and assigns of the party for whose benefit it is made.

The pleadings and stipulations show the following facts: The Montana Union Railroad Company, the

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Montana Railway Company, and the Butte, Anaconda & Pacific Railway Company are separate corporations, but the stock of the Montana Union and of the Montana Railway Company is controlled by the Northern Pacific Railway Company. The Butte, Anaconda & Pacific line starts from Butte, and runs to the city of Anaconda. For 14 miles after leaving Butte its course is south; then it runs northwesterly about 12 miles to Anaconda. The Montana Union runs from Butte to Garrison, a station on the Northern Pacific main line. It practically parallels the Butte, Anaconda & Pacific for a distance of 14 miles; that is to say, from Butte towards Anaconda the lines are parallel for a distance of 14 miles. About 3 miles north of where the lines of the Montana Union and the Butte, Anaconda & Pacific diverge at all is the station of Stuart, on the main line of the Montana Union. The Montana Railway Company's line runs from Stuart to Anaconda in a north-northwesterly direction. The Montana Railway and the Butte, Anaconda & Pacific have one common terminus,—the city of Anaconda. Their other termini are Stuart, of the Montana Union, and Butte, of the Butte, Anaconda & Pacific. Stuart, a terminus of the Montana Railway Company, is from $2\frac{1}{2}$ to 3 miles from the nearest point on the Butte, Anaconda & Pacific line. For several months prior to May 1, 1898, the Montana Railway was temporarily operated by the Northern Pacific, but on May 1st it leased its line between Anaconda and Stuart to the Butte, Anaconda & Pacific Company, as heretofore stated. It is admitted that the Montana Railway and the Butte, Anaconda & Pacific lines are connected at Anaconda, and that the shortest route from the city of Butte *via* Anaconda to Stuart, and stations on the Montana Union Railroad north of Stuart, and all stations on the Northern Pacific main line, is by way of the Butte, Anaconda & Pacific, to Anaconda, and from Anaconda to Stuart by the Montana Railway, and from Stuart northerly on the Montana Union to points along the lines of the Montana Union and Northern Pacific. It is also admit-

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ted that the Butte, Anaconda & Pacific Company each day runs continuous trains over the route just described, and intends to continue to run such trains.

The proposition advanced by the attorney general is that the Butte, Anaconda & Pacific Railway and the Montana Railway lines are parallel and competing, and that for that reason the lease of the Montana Railway to the Butte, Anaconda & Pacific Company is prohibited by the constitution, and *ultra vires* of the corporation. On the other hand, the defendants insist—First, that the facts establish that the above-mentioned lines of railway are not parallel or competing, and are continuous and connected; second, that, if the proposition just stated is not tenable, still the lease is valid, and but the exercise of the powers granted to the aforesaid corporations by the laws of Montana under which they are organized, and not in conflict with the constitution. It can be safely stated that, unless the legislature has given to the corporations here interested the right to lease, the power does not exist. This principle is now firmly established by the supreme court of the United States, having been laid down by JUSTICE MILLER for the court, in *Thomas v. Railroad Co.*, 101 U. S. 71, in the following words: "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes,—that what is fairly implied is as much granted as what is expressed.—it remains that a charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." We are, therefore, brought to inquire where the consent is to be found. In considering this question, it becomes necessary to examine the constitution of the state and the statutes, and then to observe their relation to the general subject under consideration, and to one another. Cutting out of the controlling constitutional provision language not material to railroad corpora-

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tions, we have the following clause: "No railroad corporation, or the lessees or managers thereof, shall consolidate its stock, property or franchise, with any other railroad corporation, owning or having under its control a parallel or competing line; neither shall it in any manner unite its business or earnings with the business or earnings of any other railroad corporation, nor shall any officer of such railroad company act as an officer of any other railroad company owning or having control of a parallel or competing line." Const. art. 15, § 6. Turning to the statutes, we find that the legislature adopted sections 911, 912, and 913 of the Civil Code at the time of the adoption of the Codes. Section 911 authorizes any two or more railroad corporations whose respective lines, not being parallel or competing lines, are wholly or partly within this state, when their respective lines of road, or any branch thereof, so connect within this state that they may operate together as one property, to consolidate their capital stock, franchises, and property, and thereby to become one corporation by any name adopted, which may be that of one of them, upon such terms and conditions as may be agreed upon by the corporations in the manner provided by the statutes. Section 912 provides that any railroad corporation whose line is wholly or partly within Montana, or reaches the boundary lines thereof, whether organized under the laws of Montana or of the United States, or of any other state or territory, may lease or purchase the whole or any part of the railroad or line of railroad of any railroad corporation, together with all the rights, powers, immunities, franchises, etc., provided the railroad or line of railroad so leased or purchased is continuous or connected with its own line, and not a parallel or competing line. Section 913 provides that any railroad corporation organized as in the preceding sections shall have authority to negotiate and deliver its bonds, securities, or obligations, and negotiate the same in such manner as the board of directors may authorize or determine, and to secure the payment of such bonds as the corporation may

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execute and deliver such mortgages or deeds of trust upon all or any part of its property as the directors may determine; and, if any such mortgage shall so provide, it shall be and remain a valid lien upon the property of the corporation irrespective of the law relating to chattel mortgages, and such mortgage shall be taken, held, and enforced as are mortgages of real estate. The foregoing statutes intended to give, and did give,—First, a complete power of consolidation, by which a corporation formed by a consolidation should be a corporation succeeding to and having, owning, and exercising all the powers, rights, franchises, and immunities possessed by the corporations consolidated into one, provided the consolidating corporations were not parallel or competing; second, an equally adequate power, whereby one railroad corporation could lease or purchase the whole or any part of another railroad corporation's property, together with its rights and franchises, provided the leased or purchased railroad was continuous or connected with its own line, and was not parallel or competing; third, a further general power to any railroad corporation to issue bonds and mortgage its property. If the statutes just cited were in force, and were the only ones in force, the questions necessary to be determined in this case would be simply whether or not the Montana Railway is continuous or connected with the Butte, Anaconda & Pacific, and whether the Butte, Anaconda & Pacific and the Montana Railways are competing and parallel. If those questions were answered affirmatively, clearly the power necessary to authorize the lease under examination is denied by the inhibitory language of the constitution.

But we must go further, and consider another section of the Statutes. By an act approved March 4, 1893 (3d Sess. Laws, p. 157), and especially preserved and continued in force by section 5186 of the Political Code, approved March 13, 1895, the legislature provided as follows: "Any railroad company now or hereafter incorporated pursuant to the laws of

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this state, or of the United States, or of any state or territory of the United States, may at any time, by means of subscription to the capital stock of any other railroad company, or by the purchase of its stock or bonds, or by guaranteeing its bonds, or otherwise, aid such company in the construction of its railroad within or without this state; and any company owning or operating a railroad within this state may extend the same into any other state or territory, and may build, buy, lease, or may consolidate with any railroad or railroads in such other state or territory, or with any other railroad in this state, and may operate the same, and may own such real estate and other property in such other state or territory as may be necessary or convenient in the operation of such road; or any railroad company may sell or lease the whole or any part of its railroad or branches within this state, constructed or to be constructed, together with all property and rights, privileges and franchises pertaining thereto, to any railroad company organized or existing pursuant to the laws of the United States, or of this state, or of any other state or territory of the United States; or any railroad company incorporated or existing under the laws of the United States or of any state or territory of the United States, may extend, construct, maintain and operate its railroad, or any portion or branch thereof, into and through this state, and may build branches from any point, or such extension to any place or places within this state; and the railroad company of any other state or territory of the United States which shall so purchase or lease a railroad, or any part thereof in this state, or shall extend or construct its road or any portion or branch thereof in this state, shall possess and may exercise and enjoy, as to the control, management and operation of the said road, and as to the location, construction and operation of any extension or branch thereof, all the rights, powers, privileges and franchises possessed by railroad corporations organized under the laws of this state, including the exercise of the power of eminent do-

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main. Such purchase, sale, consolidation with, or lease may be made, or such aid furnished upon such terms or conditions as may be agreed upon by the directors or trustees of the respective companies; but the same shall be approved or ratified by persons holding or representing a majority in amount of the capital stock of each of such companies, respectively, at any annual stockholders' meeting or at a special meeting of the stockholders called for that purpose, or by approval in writing of a majority in interest of the stockholders of each company respectively: provided, that nothing in the foregoing provisions shall be held or construed as curtailing the right of this state, or the counties through which any such road or roads may be located, to levy and collect taxes upon the same and upon the rolling stock thereof, in conformity with the provisions of the laws of this state upon that subject; and all roads or branches thereof in this state, so consolidated with, purchased or leased, or aided and extended into the state, shall be subject to taxation and to regulation and control by the laws of this state, in all respects the same as if constructed by corporations organized under the laws of this state; and any corporation of another state or territory, or of the United States, being the purchaser or lessee of a railroad within this state, or extending its railroad or any portion thereof into or through this state, shall establish and maintain an office or offices in this state at some point or points on its line at which legal process and notice may be served, as upon railroad corporations of this state: provided further, that before any railroad corporation organized under the laws of any other state or territory of the United States shall be permitted to avail itself of the benefits of this act, such corporation shall file with the secretary of state a true copy of its charter or articles of incorporation." Civ. Code, § 923. There are manifest and numerous irreconcilable inconsistencies between this last section quoted and sections 911 and 912. Although all three statutes refer to the general subject of consolida-

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tion, purchasing, and leasing of railroads by other railroad corporations, the method of procedure to effect a consolidation is different, and restrictions expressly included within the provisions of sections 911 and 912, not necessary to be here set forth in detail, are not found in section 923. But, as more conspicuous than other differences, it is noticeable that in 923 the right to consolidate, lease, or buy is granted without regard to whether or not the railroads owned by the contracting parties are parallel or competing, or continuous or connected. The latter statute was a departure from a previous legislative policy. It may be this departure arose by reason of considerations which led the legislature to believe that principles of public policy do not invalidate reasonable traffic arrangements between lines of railway whereby one railroad corporation may lease for a reasonable period of time an independently incorporated short line, which is a spur or feeder of still another and more important line; and that on this account they were led to authorize in express terms such agreements, even though the leased line is a link which by its connections becomes a competing line. They had a right, subject to the limitations of the constitution, to adopt a policy less restricted than that which had been recommended by the code commissioners, or established by their own action just previously taken; and it is not for the court to determine the wisdom of a policy underlying laws which have resulted from changed opinions of the law-making body. It is far more likely, however, that the peculiar condition presented really arose by the difference of views between the code commissioners who reported the Civil Code in 1892 and the several legislatures which met after the report of that commission, and before the adoption of the Codes as reported. It appears that sections 555 and 556 of the Civil Code, as reported by the Code commission, were adopted February 19, 1895, when the Civil Code was adopted, as sections 911 and 912 of that Code. The legislature, for convenience sake, passed the whole Code substan-

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tially as reported, and then proceeded to amend or revise the Code as passed. But between the time of the report of the code commission and the adoption of the Codes, the legislative session of 1893 occurred, and it was then that section 923 was enacted. Thereafter came the session of 1895, whereat a preserving act (Pol. Code, § 5186) was passed after the adoption of the Codes. This preserving act specially continued in force section 923. Applying now the rules of construction laid down in the case of *State v. Rotwitt*, 17 Mont. 41, 41 Pac. 1004; *Steele v. Gilpatrick*, 18 Mont. 453, 45 Pac. 1089; *Proctor v. Cascade Co.*, 20 Mont. 215, 50 Pac. 1017,—it is our opinion that the intent of the legislature was to cover the whole subject of delegating the power to railroad corporations to consolidate, lease, and purchase by section 923, and in this respect to revise and repeal the provisions of sections 911 and 912. So far, therefore, as the power is involved, section 923 displaced and repealed all former laws upon that subject. Whether a certain manner of procedure laid down in Section 911 is yet in force, we need not here inquire.

Proceeding, then, the case comes to this: If the law (section 923) is not in conflict with the constitutional section quoted, the Butte, Anaconda & Pacific Company can lease the Montana Railway line irrespective of all questions of competition or parallelism. We now speak of leasing only, because the power to consolidate, although expressly given by section 923, obviously can only be exercised in a constitutional manner; that is, by railroad corporations not owning or having under their control parallel or competing lines. The language of the constitution in respect to consolidation is too plain to require any argument on that point. No one could seriously contend that, if the railroad corporations, parties to the lease in question, are parallel or competing, they can consolidate into one resultant corporation, directly or indirectly. Section 923 is to be read as merely authorizing the amalgamation or consolidation of railroads not forbidden to amalgamate or consolidate

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by the constitution. Cooley, Const. Lim. 218. The correctness or applicability of these rules of construction is not seriously controverted, we take it, by the attorney general. There is, therefore, authority in the railroad corporations concerned in this suit to make the contract of lease under section 923, unless such authority is denied under the constitution, for the reason that the lines involved are parallel or competing lines, and that the lease between them is a consolidation of one with the other.

We now directly meet the recurrent questions: Are the roads of the Butte, Anaconda & Pacific and the Montana Railway Companies parallel or competing lines, and, if they are, may they contract by lease? The true rule is that whether two railroads are parallel or competing is a question of fact,—of physical fact. Actual mathematical parallelism is easily demonstrable by engineers' maps of surveys and calculations. Exact parallelism, however, is not what is included in the meaning of the words of the constitution forbidding consolidation of parallel railroads. A reasonable construction must obtain. In a mountainous country it is wellnigh impossible to conceive of two railroads running any distance precisely equidistant at all points. We should say that by parallel railroads are meant railroads running in one general direction, traversing the same section of country, and running within a few miles of one another throughout their respective routes. They may or may not be competing. That depends upon their termini, and their commands of traffic. *Railroad Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714. Independently of the Montana Union Railroad, the Montana Railway cannot be said to be a parallel line to the Butte, Anaconda & Pacific between Butte and Anaconda. One of the principal terminal points of the Montana Railway line is Stuart, on the line of the Montana Union, while one of the principal terminal points of the Butte, Anaconda & Pacific is Butte. Anaconda is the other principal terminal point of each. From Stuart to Anaconda, though,—a distance of about

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12 miles,—there is a substantial parallelism in their routes. Still, we think it doubtful whether the Montana Railway is a parallel line of the Butte, Anaconda & Pacific in a sense that would prevent its union with the Butte, Anaconda & Pacific, if such consolidation or union were attempted under the law. But, passing that question without decision of it, are they competing lines of railway? Here again, if we take the separate corporation, the Montana Railway Company, and its railroad line as an independent one, and examine the maps and consider the section through which the roads run, we find there could be no substantial competition with the Butte, Anaconda & Pacific, for the reason that the traffic between Stuart and Anaconda on the Montana Railway, and that point on the Butte, Anaconda & Pacific nearest to Stuart and between such point and Anaconda, and between intermediate points and Anaconda, is entirely insignificant, as there are no towns or freight stations, to furnish business sufficient to make such competition along the lines of the two roads between such points and the city of Anaconda. Whether lines of road are competitive or not depends upon the business of the companies, the conduct of the roads by their authorities, their channels of traffic, and generally—nearly always—upon whether the roads extend for transportation from and to the same points along their routes. Strictly speaking, the line of road of the Montana Railway Company consists of the road—the superstructure—over which it operates its trains in the exercise of its franchise, and none other. From an exact standpoint it is limited in its railroad operation to the few miles of rails and other property belonging to its own corporation, inasmuch as it neither controls nor operates other roads by lease, ownership, consolidation, or otherwise. Thus literally regarding the situation, there could be no competition between the Montana Railway and the Butte, Anaconda & Pacific lines.

But a majority of the court prefer to adopt what we think to be a more practical way of looking upon this

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branch of the case, and to consider the constitution as comprehending by competing lines not only railroads which run between the same two principal points on their own lines, but those which, having one common terminus, yet are actually connected with other railroads, and which by arrangements with such other railroads concerning the transportation of freight and passengers, are so related to one another in fact as to give them the opportunity by geographical situation to directly cut rates to principal or terminal points. *Railway Co. v. State*, 75 Tex. 434, 12 S. W. 690. To apply this by a plain illustration: A merchant in Anaconda buys his goods at San Francisco. The goods are delivered in transit at Butte. From that point to Anaconda the merchant has a choice of routes, one practically as direct as the other. He may ship over the Butte, Anaconda & Pacific to Anaconda, or over the Montana Union to Stuart, and thence to Anaconda via the Montana Railway route. They are equally convenient, and in a situation to underbid one another as to the rates of transportation. Especially is this so in the illustration given, for the Montana Union and the Montana Railway Companies are both under the control of the Northern Pacific, so that the traffic arrangements as well as other conditions exist whereby the competition can be vigorous and effective. Conditions of the fact made apparent by the record and plats before us have, for the reasons given, led a majority of the court to conclude that by its alliance, with the Northern Pacific, and its geographical situation, the Montana Railway line is a competing line with the Butte, Anaconda & Pacific between Butte and Anaconda. Reverting to the constitution, we find no prohibition against a railroad corporation leasing its stock, property, or franchise to any other railroad corporation, or having under its control a parallel or competing line, unless a leasing is a consolidation, or unless there are other parts of section 6 of article 15 which should be construed as prohibiting such contracts of lease. Many

Competing Lines—
Definition.Same—Power to
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constitutions, in their provisions to guard against all possible contingencies whereby competition between railroads may be interfered with, do prohibit leasing or purchasing, as well as consolidation; others, in terms much like ours, only prohibit consolidation. As bearing upon the evident policies of several certain states at the dates of their adoption of their respective constitutions, provisions of organic laws as they stood in 1894 upon this subject may be grouped as follows: The following states provide that no railroad corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or control, any other railroad corporation owning or having under its control a parallel or competing line: Arkansas, Const. 1874, art. 17, § 4; Kentucky, Const. § 201; Missouri, Const. 1875, art. 12, § 17; Pennsylvania, Const. art. 17, § 4; Texas, Const. art. 10, § 5. The following states substantially provide only that no railroad corporation, or the lessees or managers thereof, shall consolidate its stock, property, or franchises with any other railroad corporation owning, or having under its control, a parallel or competing line: Colorado, Const. 1876, art. 15, § 5; Illinois, Const. 1870, art. 11, § 11; Michigan, Const. 1850, art. 19a, § 2; Nebraska, Const. 1875, art. 11, § 3; Washington, Const. 1889, art. 12, § 16. The constitutions of North Dakota (Const. 1889, art. 7, § 141) and of South Dakota (Const. 1889, art. 17, § 14) prohibit in identical language the consolidation of the stock, property, or franchises of railroads owning parallel or competing lines, but especially provide that "any attempt to evade the provisions of this section [pertaining to consolidation] by any railroad corporation by lease or otherwise, shall work a forfeiture of its charter." There we have, in effect, a provision against leasing for a long time, if not altogether. In West Virginia, by section 11 of article 11 of the constitution of 1872, consolidation or obtaining the possession of parallel or competing lines by lease

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or other contract is prohibited without the permission of the legislature. The statutes (Code 1887, p. 521, § 53) give these rights, and provide the manner of their exercise. In Wyoming (Const. 1889, art. 10, § 8) there is simply a general prohibition against consolidation or combination of corporations of any kind to prevent competition. No special clause is found as applicable to railroads or any other class of corporations. In Georgia the constitution (article 4. § 2, par. 4) denies to the legislature the power to authorize any corporation to make any contract with another corporation "which may have the effect or be intended to have the effect to defeat or lessen competition in the respective businesses or to encourage a monopoly." In Utah (Const. 1895, art. 12, § 13) consolidation is prohibited with any other railroad "owning a competing line." This utterance is the very latest constitutional provision, and is noteworthy as not prohibiting leasing or purchasing, or even consolidation, of one road with another which has under its control a competing line or a parallel line.

Comparison between these various constitutional limitations shows that no one is precisely like the prohibition of the Montana constitution. Similarity exists in but one principal respect. Almost every constitution imposes various limitations upon the power of consolidation, and so general is antagonism to the consolidation of competing railroads that, where the constitutions are silent, statutory enactments frequently prevail by which the principle is affirmatively established that there shall be no consolidation of competing railroads. Minnesota, Gen. St. 1894, § 2716; Arizona, Rev. St. § 318; New Hampshire, Gen. Laws, p. 377, § 11; New York, Laws 1869, c. 917, § 9; North Carolina, Battle's Revisal, p. 751, § 65; Wisconsin, Rev. St. § 1833. In Florida (Rev. St. 1892, § 2248), parallel or competing roads may not consolidate except by consent of the railroad commission. Other states, by withholding the power to consolidate, prohibit the exercise of it. Conforming to this general policy,

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Montana has by no uncertain language aligned herself with her older sister states, where experience has demonstrated that the merger of two competing railroads into one is apt to result in stifling free competition, and hence is disadvantageous to the well-being of the state. Sufficient demonstration of this proposition consists in the statement that great accumulations of property in the hands of any corporate power, likely to hold on to such accumulations, are dangerous to public welfare. The life of an individual is too limited to render such dangers very great where tremendous wealth is in his hands. but a corporation seldom feels that the bounds of human life, or even of its own chartered existence, should too closely circumscribe its actions. Restraints by limitations upon and within their grants of powers are necessary, lest they may become much too strong for society. If, for instance, consolidation were allowed with no bounds of restraint, a railroad's possessions might become a colossal enterprise owning all means of transportation within a state. Without rivalry of railroads, monopolies might grow up, and, to bring the dangers of destroying competition before us, that remarkable progress which this young state has made in its healthy development could be stayed by the consolidation or amalgamation of railroad corporations owning competing lines. The maxim, "Competition is the life of trade," forms the base of the constitutional prohibition against consolidation of rival railroads, and whatever consolidation does include within its meaning is absolutely illegal and void. What is a consolidation of one railroad corporation with another? Ror. R. R. p. 588, thus defines it: "The consolidation of two or more railroad corporations is the permanent union of their interests, management, and control, either in the formation of a new company out of the consolidated ones, or else by a consolidated management of the old ones unitedly, whilst their distinct corporate entities still remain. It can only be brought about by authority of law. A mere co-operating temporarily in the running of lines and transact-

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ing the business of two or more roads does not amount to a consolidation thereof." The supreme court of Alabama, in *Meyer v. Johnston*, 64 Ala. 603, said: "When the rights, franchises, and effects of two or more corporations are, by legal authority and agreement of the parties, combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is in law, and according to common understanding, a consolidation of such companies, whether such single corporation, called the consolidated company, be a new one then created, or one of the original companies, continuing in existence with only larger rights, capacities, and property. Acceptance of this as correct makes it easy to understand that authority given to consolidate 'to such an extent, and on such terms, as the parties may agree upon confers the power to constitute one of the original companies the consolidated company.'" From the Alabama court's opinion, Reese on *Ultra Vires* (section 142) has deduced his text, from which we quote: "The 'consolidation' of a corporation has been defined to be 'a surrender of the old charters by the companies, the acceptance thereof by the legislature, and the formation of a new corporation out of such portions of the old as enter into the new.' The more modern understanding of a consolidation, however, might be better stated by saying that when the rights, franchises, and effects of two or more corporations are by legal authority and agreement of the parties combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those of the companies thus agreeing, this is in law a consolidation, whether the consolidated company be a new one then created or one of the original companies continuing in existence with only larger rights, capacity, and property. 'Amalgamation' has been declared to be when the existing companies agree to abandon their respective articles of association and regulation, and to register themselves under new

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articles as one body. This would be a new company formed by the coalition or amalgamation of the companies previously existing. The expression 'amalgamation,' however, is of English origin, has never appealed to the judicial sense of this country, and is seldom used to designate the union of two or more corporations; the word 'consolidation' being the term in common use." In *Mackintosh v. Railroad Co.*, 34 Fed. 582, the court, recognizing a difference between a purchase and a consolidation, observed: "Under the general railroad law, companies are allowed to consolidate when they form continuous or connecting lines. This contemplates the formation of a new corporation, and requires the consent of the majority of the stockholders in each company. This statute, however, does not cover this case. This is not to be a consolidation, but a purchase of the latter company's stock, property, and franchises, and to use the same as part and parcel of the purchasing company, and then to bring the acquisition within the operation of its own charter. The consolidation statute does not authorize one company thus to acquire and absorb another." Elliott on Railroads (section 335) says: "Ordinarily the effect of a consolidation is to dissolve the old companies and form a new one; but this result does not always follow, for it depends largely upon the terms of the consolidation, and the legislative intent as manifested in the statute under which the consolidation takes place; and the constituent companies usually have at least a qualified existence for the purpose of winding up their affairs and preserving the rights of their creditors. The term 'consolidation' is an elastic one, and may include a union of two or more corporations into a new one with a different name, with or without extinguishing the constituent corporations, or the merger of two or more corporations into another existing corporation under the name of the latter. There is, as we have already said, a distinction between these modes of consolidation. In the latter case, if the merger is complete, it is evident that the one corporation is extinguished, unless kept alive for

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certain purposes, while it is equally clear that the other, in which it is merged, is not dissolved. In other words, the legislative intention in such a case would seem to be to unite the two companies under the old charter of one of them, while statutes authorizing the consolidation of two or more corporations in the ordinary way are generally construed as authorizing the formation of a new and distinct corporation, thus extinguishing all the constituent companies unless a contrary intention is manifest." Further citations from the great number of cases that we have studied would be superfluous, for they are practically uniform in defining a consolidation of corporations to be a merger, a union, or amalgamation, by which the stock of the two corporations is made one, by which their property and franchises are combined into one, by which their powers become the powers of one, by which their names are merged into one, and by which the identity of two practically, if not actually, runs into one.

Consolidation—
Definition.

Section 911 of the Civil Code of Montana is not merely a legislative declaration of the manner of consolidation, but serves as a definition as well. It specially provides how two railroad corporations may become one by any name adopted, how their shares may be retired or exchanged for the capital stock of the resultant corporation, how the corporation formed by the consolidation shall succeed to the rights, powers, privileges, franchises, immunities, and property possessed by the corporations so consolidated, etc. Ordinarily no idea of a lease would ever enter into any explanation of what constituted a consolidation, unless such contract of lease was for so long a period of time, or by its terms was such as to make it a practical merger of one corporation into another. Lease does not imply consolidation, nor consolidation lease. The power to consolidate, as has been seen, is a power to make two corporations one; the power to lease carries with it no power to pass any thing except the right to use the property leased. In the lease under considera-

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tion there is no merger of ownership, no communion of interest, no distribution of receipts based upon a contingent measure of profits, no common ownership of shares of stock, no joint management, and no yielding up of an independent corporate existence by the lessor to the lessee. As was said in *State v. Vanderbilt*, 37 Ohio St. 590: "Power to lease does not imply the power to consolidate, nor power to consolidate the power to lease. They are distinct and independent powers. Nothing passes under the lease except the right to the use. The lessor retains its existence, and its right to consolidate with connecting lines. There can be no consolidation except as to connecting lines. These connecting lines belong to the lessor companies, but these have not entered into the consolidation." In *Mills v. Railroad Co.*, 41 N. J. Eq. 1, 2 Atl. 453, a question arose involving the power to lease under a power to consolidate. CHANCELLOR RUNYON, for the court, expressly held that power to consolidate did not involve authority to lease, and did not enlarge an authority to convey lands, etc., conferred by a charter to a railroad company. The reasoning of that case was that a power to consolidate is to take in a partner, or to go in as a partner, while power to lease is power to dispose of the whole concern to a stranger. "In a consolidation," say the court, "the stockholders of the respective companies still retain, to a certain extent, control of their corporate property, but by a lease the stockholders of the leasing company part with the control of their corporate property, and hand it over to the others, and abandon their enterprise." We cannot approve altogether of the reasoning of the chancellor, except as it was applicable to the facts of that case, which involved a railroad lease of 999 years. We are of the opinion that a lease, fair in its terms, for 10 years, in no manner involves an abandonment of a railroad enterprise, or is in fact more than a temporary parting with the control of the lessor's corporate property. Reservations in this lease of the Montana Railway Company to the Butte, Anaconda & Pacific give the

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lessor corporation right to repossess itself of its property, and to oust the lessee, and terminate the lease, in the event of certain violations of the covenants of the contract. There is nothing contained in its provisions from which an abandonment can be inferred. The case cited is none the less a strong support of the view that the prohibition against a power to consolidate does not include a prohibition of a power to lease when the legislature has clearly authorized such latter power ; for, if a lease of 999 years is not a consolidation, *a fortiori* a lease of 10 years is not.

Distinction has also been made between union and consolidation and purchasing by one railroad corporation of another's property and franchises. By the railroad law of New Jersey power was given to railroad companies to lease their roads to any other corporation, or to unite and consolidate. But the court held, in *Elkins v. Railroad Co.*, 36 N. J. Eq. 5, that there could be no purchase of a rival railroad under a power of consolidation, as the powers given did not authorize it. In *Gere v. Railroad Co.*, 19 Abb. N. C. 193, we have an adjudication of this important question directly in point. The case is of high authority because of the list of eminent counsel who presented it to the court. Gere and others brought an action on their own behalf and in behalf of all other stockholders of the New York Central & Hudson River Railroad Company against that corporation and the New York, West Shore & Buffalo Railroad Company and certain firms to restrain the consummation of a lease between the railroad companies. The West Shore & Buffalo Company was a competing road in all respects for its entire length. It attempted to lease its road, property, and franchises to the New York Central Company for the term of 475 years. The rental consideration was a guaranty of payment of the principal and interest of certain bonds of the West Shore road. The statute of New York authorized any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter gave the use of

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the leased railroad in such manner as might be described in the contract. The statute then contained these words: But nothing in this act contained shall authorize the road of any railroad corporation to be used by any other railroad corporation in a manner inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract." Laws 1839, c. 218. By Laws 1869, c. 917, § 9, railroad corporations were also authorized to consolidate and merge their capital stock, franchises, and property with the capital stock, franchises, and property of any other railroad, etc.; and it was further provided that "no companies or corporations of this state whose railroads run on parallel or competing lines shall be authorized by this act to merge or consolidate." The court through KENNEDY, J. first disposed of the question of power to lease by holding that it existed under the statutes referred to, and then discussed the prohibitory section above quoted in the following language: "The leasing of one railroad by another, whether for a longer or shorter period, is not a merger or consolidation. The term 'lease' implies the continued existence of the corporation, the lessor, with all its powers and functions, and all the rights incident to its creation; and it would be a gross misapplication of terms to hold that a leasing or contract for use by one railroad to another is a merger or consolidation of the two roads. I am therefore forced to the position that it—the West Shore road—has the authority to execute the lease, and the New York Central has the power and right to receive the same, and to pay rental for the use thereof; and because said roads are competing roads, there being no statutory inhibition upon that ground, it is not a reason why a lease may not be executed by the one and accepted by the other. Upon the assumption that the legislature has authorized a lease between two roads situated as these two roads are, the question of public policy does not enter into a consideration of the questions involved here. If the power has been granted by the legislature,

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although it may be deemed unwise, and in this instance dangerous in its execution, the remedy will be found in another department of the government, and is not lodged in the judiciary. Several statutes recognize the right, power, and authority of the lessee of a railroad to receive by transfer from the lessor or other or others owning the same the capital stock in the leased road. Laws 1855, c. 302; Laws 1867, c. 254; Laws 1883, c. 383." Thompson on Corporations (volume 5, § 5891) approves of the doctrine of *Gere v. Railroad Co.*, *supra*, and says that "a statute prohibiting railroad corporations whose roads run on parallel or competing lines from merging or consolidating does not prohibit one such corporation from leasing its road to another."

As against the right to contract by lease, the learned attorney general relies upon the case of *State v. Railroad Co.*, 24 Neb. 143, 38 N. W. 43. There the question arose of the power of two lines of railway to consolidate, when, after they were consolidated, they would form a continuous line without break of gauge or interruption. It was held that the Atchison & Nebraska Railway extending from Atchison, Kan., to Lincoln, Neb., and leased to the Burlington & Missouri River Railroad, did not form a continuous line with the Burlington & Missouri, and that the case was not within the provision of the statute authorizing the making of a lease where the roads of the lessee and lessor will form a continuous line, and that the lease was, therefore, unauthorized. After deciding this question, the court, through MAXWELL, C. J., proceeded *obiter* to fortify its decision upon the further ground that the lease was, in effect, prohibited by the constitutional provision against consolidating railroad corporations owning parallel or competing lines. "The word 'consolidate,'" said the chief justice, "is here used in the sense of 'join' or 'unite.' The constitution aimed at practical results. * * * The law cannot be evaded, therefore, by substituting a lease for a deed of conveyance." The court regarded the lease in that case as

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within the inhibition of the constitution. The decision of the Nebraska case was based, however, upon a construction placed upon an attempt by one railroad to lease another competing road for a period of 999 years, and what we have said heretofore in relation to the proper limitations to be put upon the language of CHANCELLOR RUNYON in the New Jersey case is applicable to the Nebraska decision also. A lease for 999 years may be properly regarded as a joinder or consolidation of two competing railroads; it may be such a lease practically involves the consolidation and control of parallel or competing roads, and necessarily, in effect; operates as a surrender of corporate franchises by the lessor corporation. This point was emphasized in the opinion. But conceding, for the sake of argument, that the Nebraska decision is directly in point, its force and effect are very much weakened by the subsequent decision by the same court in the same case, reported in *State v. Railroad Co.*, 38 Neb. 437, 57 N. W. 20. After the first decision, in 1888, by CHIEF JUSTICE MAXWELL, and after it had been held that the lease of respondent to the Burlington & Missouri River Railroad Company should be declared void, upon a demurrer, respondent answered and negatived all the allegations of infringement of the provisions of the statutes and constitution of the state of Nebraska. The referee afterwards decided that the roads were not competing roads within the meaning of the constitution, and that, therefore, the lease was valid. The court sustained the lease by a brief opinion. CHIEF JUSTICE MAXWELL, who had written the opinion of the court at the former hearing, dissented, principally upon the ground that the roads were competing roads, and that the lease was a violation of the constitutional provision. His construction of the majority opinion is that it contains an admission that the defendant is a competing line at the most important point on the roads, and upon this admission he says there is no power to declare such consolidation not prohibited by the constitution. The case stands, therefore, as practically overruled by

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this later decision, for there is no escaping the conclusion made plain by JUDGE MAXWELL that the court has receded from its former doctrine.

Pearsall v. Railroad Co., 161 U. S. 646, 16 Sup. Ct. 705, also cited by the attorney general, involved a proposed arrangement between the Great Northern and Northern Pacific Railway corporations, by which there was to be an organization of a new corporation, which should issue its bonds, payment of which was to be guarantied by the Great Northern, part of the capital stock to be transferred to the shareholders of the Great Northern; and a traffic contract was to be entered into by which the common earnings were to be divided, and traffic was to be exchanged. The statutes of Minnesota forbid railroad corporations to consolidate with, lease, or purchase, or in any way to become owner of or control, any other railroad corporation, or any stock, franchises, rights, or property thereof, which owns or controls a parallel or competing line. The case was decided upon the theory that the arrangement was a consolidation of two competing corporations. The agreement between them was regarded as nothing less than a purchase of a controlling interest, and as practically contemplating the absolute control of the Northern Pacific by the reorganized corporation. The "ultimate amalgamation" seemed apparent to the court, and the statute was held applicable to prevent such an amalgamation. The decision affirms our views upon the question of consolidation, but, considering the statute of Minnesota, it has little or no bearing upon the questions involved in this case.

We are not unmindful of the spirit which pervades the more modern constitutions against arrangements between competing lines of railroad which may result in monopolies of traffic, and we are not disposed to yield at all in that rigidity of interpretation which we believe must be placed upon the prohibition of the constitution against consolidation of such roads. On the other hand, there are certain fundamental principles of construction by which courts

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must be guided in correctly ascertaining the intent of a written constitution. Judges are not at liberty to declare an act of the legislature void because, "in their opinion, it is opposed to a spirit supposed to pervade the constitution, but not expressed in words." Cooley, Const. Lim. p. 204. The framers of the constitution are presumed to have employed language with sufficient precision to convey the intent of the instrument framed. And when they only prohibited consolidation of competing railway lines, we understand the word to have been used in its natural sense, and that the constitution intended what it says; that is, forbids what it has forbidden. Nor does an apparent impolicy of a statute authorize a court to declare it void. "When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare the limitation under the notion of having discovered something in the spirit of the constitution which is not even mentioned in the instrument." *People v. Fisher*, 24 Wend. 215. There is a conclusive presumption, when a state law is attacked upon the ground that it is void, that it is valid unless the constitution of the state prohibits it. Before it can be set aside as invalid, we must find that "limitations have been imposed upon the complete power which the legislative department of the state has vested in its creation." Cooley, Const. Lim. p. 206. It is therefore upon these principles that we have patiently and deliberately considered this case. What exigencies may have arisen which deterred the framers of the constitution from prohibiting reasonable leases by one railroad of another, even though they be of competing lines, it is not for us to say. In Montana, as in many other states, the question of authority for leasing railroads has been left to the legislature, which has in turn exercised its power. The courts cannot determine a policy unless it is fairly to be inferred from the language used. It may have been the belief that excessive restrictions, such as the denial altogether of the power to lease, were unwise, and likely to result in greater

Notes

harm than good; or it may have been the security felt by knowledge of the fact that by section 5 of the same article of the constitution, which prohibited consolidation, all railroads are deemed subject to legislative control, and subject to the power of the legislature to regulate and control by law the rates of transportation of passengers and freight by such companies as common carriers from one point to another in the state. Safety against extortion is always guarantied by this section; and if the two corporations, parties to this contract of lease under consideration, should attempt to charge excessive rates, the power is in the legislature to protect the people. In the particular lease before us, provision is made by covenant against increased rates. In conclusion, it is our mature judgment that, while the constitutional section quoted absolutely prohibits consolidation, whether it be direct or indirect, still the difference between a lease and consolidation is too plain to allow any interpretation being put upon the constitutional section quoted, whereby the power to lease is denied by the prohibition against consolidation.

It is unnecessary to dwell upon the latter clause of section 6 of article 15 of the constitution, heretofore quoted, by which one railroad shall not unite its business, etc., with the business of another railroad, as we are all of the opinion that it cannot be applied at all to the case before us, but pertains to different conditions. The petition is denied. Petition denied.

PEMBERTON, C. J., and PIGOTT, J., concur.

NOTES.

Competing Lines—Whether Constitutional Prohibition against Consolidation Prevents Leasing.—The lease of a competing road would not be void as a violation of New York Act of 1869, ch. 917, providing generally for the consolidation of railroads, but prohibiting it as to parallel or competing roads. *Wallace v. Long Island R. Co.*, 12 Hun (N. Y.) 460.

New York Act of 1869, ch. 917, § 9, entitled "An act authorizing the consolidation of certain railroad companies, but prohibiting the consolidation of such roads as are parallel or competing, does not

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prevent one road from leasing another, as a lease is not a merger or consolidation. *Gere v. New York C. & H. R. R. Co.*, 19 Abb. N. Cas. (N. Y.) 193.

Contra.—In *State v. Atchison, etc., R. Co.*, 24 Neb. 164, 8 Am. St. Rep. 164, the court, in regard to article 11, § 3, of the Constitution, which provides that no railroad or express company shall “consolidate,” etc., stock, franchises, or earnings in whole or in part with any other company owning a parallel or competing line, said: “This is an absolute prohibition against a railroad corporation consolidating its stock, property, franchises, or earnings, in whole or in part, with any other railroad corporation owning a parallel or competing line. The word ‘consolidate’ is here used in the sense of join, or unite. The constitutional convention aimed at practical results. The character of the title of the parties operating a railway is of but little moment to the general public, while the requirement that different roads shall continue to be competing lines, as when they were constructed, is of the utmost importance to all. The law cannot be evaded, therefore, by substituting a lease for a deed of conveyance.”

And in *Manchester, etc., R. Co. v. Concord R. Co.*, 66 N. H. 100, wherein it was objected that a lease was within a statutory prohibition against consolidation, the court said: “The purpose of the legislature was to make the act in question an effective instrumentality against the consolidation of competing roads through contracts or arrangements between them by means of which competition is removed.” See also *Currier v. Concord R. Corp.*, 48 N. H. 325; *Missouri Pac. R. Co. v. Owens*, 1 Tex. App. Civ. Cas., § 384.

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v.

HECK.

(Supreme Court of Indiana, June 17, 1898.)

Injury to Employee—Collisions—Extra Trains—Rules.—Where a division superintendent in sending out an extra train fails to comply with its rules applicable to the circumstances requiring those in charge to be notified to look out for and protect the train from a work train, which has been merely ordered to protect itself against all trains, and a collision occurs between such trains, the superintendent's failure to comply with such rules is the proximate cause of the collision, even if the work train was being run in an ordinary manner.

Same.—The fact that the engineer had received a verbal order from the operator in regard to the running of the extra train was an immaterial circumstance, the rules of the company having required that all orders should be in the name of the superintendent, and in writing.

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Vice Principals.—A division superintendent in whose name all orders in regard to the movements of trains over his division are issued is a vice-principal.

Same—Same.—Where an act of the train dispatcher is given by the company's rules all the effect of an act of its division superintendent, the company is responsible therefor in the same degree as for an act of such superintendent.

Same—Train Dispatchers.*—A train dispatcher who controls and directs the movements of trains is not a fellow-servant of trainmen, but a vice-principal.

Assignments of Error.—Error in overruling a demurrer is not available on appeal, unless the demurrer is designated and set forth in the record.

APPEAL by defendant from Carroll county circuit court. *Affirmed.*

E. C. Field, W. S. Kinnan, and Pollard & Pollard,
for appellant.

John H. Gould, M. A. Ryan, and Jas. A. Sims,
for appellee.

MCCABE, J. The appellee, as administrator of one Aaron Heck, deceased, sued the appellant to recover damages under the statute for injuries resulting in the death of said deceased, as is alleged, by the negligence of the appellant. A trial of the issues made resulted in a special verdict, upon which the court rendered judgment for the plaintiff. The errors assigned, and not waived, call in question the sufficiency of the complaint, the action of the circuit court in overruling demurrers to each paragraph of the complaint, and in overruling appellant's motion for a new trial, and for judgment in its favor on the special verdict. The substance of so much of the special verdict as is material is as follows: The defendant, on and before July 6, 1891, was, and still is, a railroad corporation, owning and operating a railroad in this state, part of which is situated between and extends from the city of Lafayette, Tippecanoe county, and passing through Bloomington, Monroe county, both in Indiana. That about seven miles south of Lafayette there was at that time, and still is, a point called

Case Stated.

*See notes at end of case.

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"Taylor's Station," where there was no telegraph or freight office; but there was a side track or switch, not being a regular station for regular trains on said road. That about $13\frac{1}{2}$ miles south of Lafayette there then was, and still is, a station called "Romney," at which there was a side track and telegraph office. That a place called "Raubs," 10 miles, and a place called "Gravellotte," $5\frac{1}{2}$ miles south of Lafayette, were flag stations, with a side track at each, but no telegraph office, and that there was no telegraph office between Romney and Lafayette. That, on said day, the decedent, Aaron Heck, was, and for two years prior thereto had been, in the employ of defendant in the capacity of fireman on a pile driver, that being his avocation, the engineer thereof being one R. G. Fletcher. That said pile driver was composed of a fire engine, boiler, and other machinery resting on a flat car, was used for driving timbers into the ground in the construction and repair of bridges on said railroad. That said pile-driver car, with such other cars as were necessary, were taken from point to point over said railroad, as ordered by defendant, by a locomotive and tender, and the whole was called a "work train," and the same was not operated on schedule time, but was always an extra, moving under special orders. On said day such work train was moved and propelled by engine No. 69, with one D. W. Myers as engineer, a fireman, and two brakemen, and S. C. Firth was conductor of said work train; and the said decedent and said Fletcher had no control or management of said work train. That, on and before said day, said railroad, for the purposes of its operation, was divided by defendant into two divisions, called the First and Second divisions, the First division consisting of that part between Lafayette and Michigan City, and between Indianapolis and Chicago. The Second division consisted of that part lying between Lafayette and New Albany, each division being in charge of a controlling officer of the defendant, called "division superintendent," who represents the defendant company. There were subordinate employees

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of the defendant, all of whom were subject to the orders and control of the division superintendent. On and before said day, one James B. Safford was superintendent, and in charge of said Second division, and had his office in Lafayette. That said Safford, as such superintendent, had authority from defendant for making up and sending out trains over said Second division, and in that regard his authority was superior to that of any other of the employees of the defendant; and on that day he represented all movements of trains of said defendant company on said Second division. That, on that morning, said work train was made up at Lafayette under the orders of said James B. Safford, as superintendent of said Second division, consisting of a locomotive, tender, a flat car, said pile-driver car, and a caboose, and was ordered by said superintendent to work during that day, from 7 o'clock in the morning until 6 o'clock in the afternoon between said Lafayette and said Romney. By usage and by the rules of the defendant, orders for the movements of all trains were issued to the conductor and engineer of each train. On said day, said work train was known and designated as "Engine No. 69"; being an extra train, and the order issued by said superintendent to the conductor and engineer of said work train on the morning of said day was as follows: "Supt. Office, Bloomington, July 6th, 1891. For Lafayette to C. & E. of engine 69. Engine 69 will work extra to-day, from 7 o'clock a. m. until 6 o'clock p. m., between Lafayette and Romney, protecting itself against all trains. J. B. S." That by said order said work train was directed to leave Lafayette at 7 a. m. of said day, and be back to said city by 6 o'clock that evening. That between Lafayette and Romney said railroad was a single track, except at the way stations before mentioned, where there are side or passing tracks. Said work train left Lafayette at 7 a. m. of said day, under said orders, and worked on a bridge near Taylor's Station, and continued to so work until about 5 o'clock and 35 minutes in the afternoon, when it started on its return to Lafay-

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ette, running backward, or caboose end foremost, at a speed of about 12 miles an hour; and at a point about $1\frac{1}{2}$ miles north of said Taylor's Station, on a curve in said road, it met and collided with an extra freight train, which had been made up and sent southward over defendant's road, and over the working limits of said work train, under order of said superintendent, and which left Lafayette about 5 o'clock that afternoon. Said extra freight train was sent out under a written order from said superintendent to its conductor and engineer, of which the following is a copy: "Supt.'s Office, Bloomington, July 6th, 1891. For Lafayette to C. & E. of Eng. 97. Engine 97 run extra from Lafayette to Bloomington, and will meet number 44, engine 34, at Linden. J. B. S." That the initial letters "J. B. S.," subscribed to each of said orders to said work train and to said extra freight train, were the initials of the name of said James B. Safford, and signified his name, and were so known, understood, respected, and obeyed by the conductors and engineers of said trains. No other orders were given to said work train or said extra freight train than above stated, nor was notice given to said work train that an extra freight train would be or had been sent south over its working limits, nor did the conductor or any one on said work train know that said extra freight train was coming or was on the road. Neither the conductor nor any one on the extra freight train had been notified by the defendant or by said superintendent that the work train was on the road, nor had they been by the defendant or said superintendent advised of the working limits of said work train. There was a rule of the defendant company, then in force, hereinafter set out, requiring that notice should have been given by the defendant to said extra freight train of the presence of said work train on the track, within said working limits, but such notice was not in this case given. Under the orders given to said work train, those in charge of it did protect it against all regular or schedule trains. The work train was running at a proper rate of speed,

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and the conductor and a brakeman thereof, as watchmen or lookouts, were on the forward end of the train as it ran northward and homeward, as required by appellant's rules. And that the engineer, conductor, and trainmen, in the management of extra freight No. 97, were on said day, at the time of said collision, acting strictly under the orders of the defendant. That under defendant's rule 105, hereinafter set out, it was impossible for the crew in charge of said work train to protect itself against said extra freight train, and at the same time return to Lafayette by 6 o'clock, as was required of it. The said rule 105 was applicable to trains stopped by accident or obstructions, and was impracticable in its application to said work train at the time of said collision, because of said orders and necessity of proceeding to Lafayette on its return from Taylor's Station. That defendant through its superintendent or otherwise did not take any steps to give notice to those in charge of either train of the presence of the other on the line of said road. The collision occurred about 5 o'clock and 45 minutes in the afternoon of said day; and, the ground being hilly, the view of the approaching trains was obstructed so that the extra freight train could not be seen from the work train until said trains were within 15 car lengths of each other; and the same was true as to the view from the freight, so that the men operating each train could not, after coming in view of each other, avoid the collision. At the time of said collision, the said Aaron Heck was at his proper place with said pile-driver engine on said pile-driver car, when said trains collided with great force, throwing some of the cars, including the said pile-driver car, from the track into the ditch, instantly killing said Aaron Heck. On and prior to said day the defendant had in force the following rules and regulations for the government and control of its employees, including the movement and running of its trains. (Then follow such rules and regulations, the material ones of which will be quoted hereafter.) there were no other rules of said defendant then in force

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relating to the management and movement of trains on defendant's road. That by said rules said extra freight and said work train were trains of the same class, and by said rules, on a single track, north-bound trains had the absolute right of track over south-bound trains of the same class. Said work train thereby had the absolute right of the track between Romney and Lafayette as against said extra freight train. The said defendant failed on said day to give a proper and sufficient order under its rules to engine 97, drawing said extra freight; and such failure was an immediate and proximate cause of said collision and death of decedent.

It is contended by the appellant that the facts found did not and do not warrant a judgment for the plaintiff, because, as is contended, those in charge of the work train were shown to have been guilty of negligence in running said work train in disobedience and in disregard of rule 105 of said company. If they did, it is conceded that such disobedience and disregard would constitute negligence such as precludes a recovery, even though the decedent had nothing to do with the negligence in running the work train, those running it being fellow servants of one common master, with him in one common enterprise, unless the actionable negligence of the appellant proximately contributed to decedent's death. The appellee, however, admitting that those in charge of the work train, as shown by the verdict, failed to observe the requirements of said rule in running it, contend that said rule by no possibility could have any application to such train. They contend that it applies only to trains stopped by accident or obstruction. That rule reads thus: "When a train is stopped by accident or obstruction, the flagman must immediately go back with danger signals to stop any train moving in the same direction. At a point fifteen telegraph poles from the rear of his train, he must place one torpedo on the rail. He must then continue to go back at least twenty telegraph poles from the rear of his train, and place two torpedoes, on the rail, ten yards apart (one rail length), when he

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may return to a point fifteen telegraph poles from the rear of his train, and he must remain there until recalled by the whistle of his engine; but, if a passenger train is due within ten minutes, he must remain until it arrives. When he comes in, he will remove the torpedo nearest the train; but the two torpedoes must be left on the rail as a caution signal to any following train. If the accident or obstruction occurs upon a single track, and it becomes necessary to protect the front of the train, or if any other track is obstructed, the fireman must go forward and use the same precautions. If the fireman is unable to leave the engine, the front brakeman must be sent in his place." But supposing that it did apply, and that those in charge of the work train violated rule 105 in failing to travel seven miles home from Taylor's Station slow enough to keep a footman before and behind walking, still appellee contends that that would not defeat a recovery. It must be conceded that if that was a violation of rule 105 on the part of those in control of the train, in which the verdict shows the decedent had no part, still, they being fellow servants with him, there can be no recovery if that negligence of his fellow servants was the sole proximate cause of the collision and death. It is contended, however, that such negligence, if it be negligence, was not, as shown by the verdict, the sole proximate cause of the collision and death. It is contended that the verdict shows that appellant's negligence in sending out the extra freight, in violation of its own rules, was at least one proximate cause of the collision and death.

The system of rules adopted by a master for the conduct of a complicated business, such as operating a railroad, and when brought to the knowledge of the employee, form a part of the contract of hiring, and become binding on both master and servant. The violation thereof, to the injury of the servant by the master, is as much an act of negligence as if the servant violates them. *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212-219, 12 N. E. 380, and cases there cited; *Railway Co.*

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v. Frawley, 110 Ind. 18-25, 9 N. E. 594; *Matchett v. Railway Co.*, 132 Ind. 334-341, 31 N. E. 792; *Whart. Neg.* §§ 205-233. Here one of appellant's own regulations wisely provided that, "when an order has been given to work between designated points, no other extra must be authorized to run over that part of the track without provision for passing the work train." But an order was given by the appellant to the extra freight, in violation of this provision, to run over the working limits designated in the order to the work train; without any provision for passing the work train. But it may be insisted that the appellant did not know, at the time the order to the work train was given in the morning, that the necessity of sending out the extra freight in the afternoon would arise. If that be so, then another provision of appellant's regulations provided for such a contingency, as follows: "When the movement of an extra train over the working limits cannot be anticipated by these or other orders to the work train, an order must be given to such extra to protect itself against the work train in the following form: (e) Extra 76 will protect itself against work train extra 95 between Lyons and Paris." But it is not claimed or pretended that this regulation was complied with. On the contrary, it clearly appears that both of these regulations were violated in sending out the extra freight. Another regulation applicable to the conditions shown to exist by the verdict requires that, "when an extra receives orders to run over working limits, it must be advised that the work train is within those limits by adding to example 'a' the words: '(g) Engine 292 is working as an extra between Berne and Turin.' A train receiving this order must run expecting to find the work train within the limits named." This regulation was left totally uncomplied with, and was violated by the appellant in sending out the extra freight. These several violations of its own rules, established by appellant presumably for the security and safety of its employees, as well as the protection of its own property, was negligence on appellant's part, and was

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a proximate cause of and without which the collision and death resulting therefrom would not have occurred. *Boyce v. Fitzpatrick*, 80 Ind. 526; *Railway Co. v. Berkey*, 136 Ind. 181, 188, 35 N. E. 3, and authorities there cited; *Coppins v. Railroad Co.*, 122 N. Y. 557, 25 N. E. 915; *Beach, Contrib. Neg.* § 304; *Railway Co. v. Lang*, 118 Ind. 579, 21 N. E. 317; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210; *Railway Co. v. Wynant*, 134 Ind. 681, 34 N. E. 569.

The appellant, however, contends that its motion for a new trial ought to have been granted, because the evidence does not support the special verdict, in that such evidence shows that appellant did not

Same.

violate its rules in sending out the extra freight without notice of the presence of the work train within the working limits designated in the order to it. This contention is founded on the testimony of Mr. Rudesall, the engineer of the extra freight, as follows: "Before starting your train out on that evening, on the 6th day of July, 1891, did you receive any further notice from the operator there that the work train was working south of Lafayette? Ans. After we got our orders, we went back upstairs, and asked him if there was not a work train out. They said there was, but it didn't concern us; they were under a flag. Q. State to the jury what the operator told you. Ans. He said they were out, but their orders didn't concern us; that they were under a flag." To determine the force and significance of this information, another regulation and rule (153), found in the book of rules, must be looked to. That rule reads thus: "A train or any section of a train must be governed strictly by the terms of orders addressed to it, and must not assume rights not conferred by such orders. In all other respects it must be governed by train rules and timetables." This notification was not an order, the operator having no power or authority to give orders himself, or to change or modify those issued by the train dispatcher in the name of the superintendent, and was in no sense a modification of the written order given to the extra

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freight. On the contrary, it amounted to a direction to run over the working limits, regardless of the work train, precisely as if previous orders had been given to the work train to clear the track for the extra freight. The regulation mentioned reads thus: "When it is anticipated that a work train may be where it cannot be reached for meeting or passing orders, it may be directed to report for orders at a given time and place, or an order may be given that it shall clear the track for a designated extra in the following form;" and then follows the form of the order. From the notification given the extra freight, those in charge of it had a right to suppose that some such order had been given to the work train; and therefore, and in any event, the extra freight was, under appellant's rules, bound to run in strict accordance with its written order. This is so because rule 113 provides that "all messages or orders respecting the movement of trains * * * must be in writing." And rule 115 provides that "extra trains must not be run without an order from the superintendent of transportation." And even the notification, as well as the strict terms of the written order, required it to run just as if the work train was not out, or, if out, was on a side track to let the extra freight pass. Therefore those in charge of the extra freight were not guilty of negligence in running, as they did, in strict compliance with their orders; but those orders were wrong, and their issue was an act of negligence, and this evidence is in no way inconsistent with the finding in the special verdict. Therefore the evidence well supports the special verdict, that the order issued to the extra freight was an improper one, and ought not to have been issued under appellant's rules, but that quite a different one should have been issued.

But appellant contends that the evidence does not support, and is contrary to, the finding in the special verdict in another respect; and that is that it does not show or prove that the appellant company gave the erroneous and improper order to the extra freight, or failed to give the proper order. The evidence shows

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that one James B. Safford was the superintendent of the second division of appellant's road, extending from Lafayette to New Albany, and that his office was in Lafayette; that he had general charge and supervision of appellant's entire business over that division of the road, and the control of the movement of all trains passing over that division; that its train dispatcher was located at Bloomington, about 100 miles south of Lafayette on its road; that the rules of the appellant required that all orders for the movement of trains over that division should be issued in the name and under the authority and direction of the superintendent of such division, but should be issued by the train dispatcher, who was authorized to sign the initials "J. B. S." to such orders. Those initials, by the rules and regulations, meant, and were intended to mean, the name "James B. Safford," who was superintendent; and orders and messages so signed, and sent by telegraph by the appellant's train dispatcher, were required, by the rules and regulations of appellant, to be obeyed and respected as the order of the said division superintendent, and said initials as his name; and such orders and messages so signed by said train dispatcher with said initials were by all employees and operatives of appellant on said division treated, respected and obeyed as the orders of said superintendent, James B. Safford; and said initials signed to such orders and messages were by said operatives, under said rules, treated, respected and obeyed as the genuine signature of said superintendent, and the genuine order of said superintendent, James B. Safford. But, as a matter of fact, the orders here involved, as well as all orders for the movement of trains over the appellant's road, or that division of it, were and are issued and telegraphed to the points to which they are applicable by the train dispatcher at Bloomington. It is not denied by appellant that the superintendent was a vice principal, acting for and representing the appellant; but appellant's contention is that the orders involved here were not in fact issued by such superintendent, and were therefore not his

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acts. If the appellant company could by any possibility, by its rules, orders, and regulations, make the acts of the train dispatcher the acts of its superintendent, the evidence clearly shows that that has been done. On general principles, it would seem that a division superintendent clothed with the powers and charged with the duties with which James B. Safford was clothed and charged, as appears by the evidence, was a vice principal, represented and acted in the place of the master, the appellant. *Taylor v. Railroad Co.*, 121 Ind. 124, 22 N. E. 876; *Krueger v. Railway Co.*, 111 Ind. 51, 11 N. E. 957; *Patterson v. Railroad Co.*, 76 Pa. St. 389. As said by Wharton on Negligence (section 232): "The true view is, as the corporation can act only through superintending officers, the negligences of those officers in respect to other servants are the negligences of the corporations." And, as is said in section, 235, *Id.*: "If a master employs experienced workmen, and directs them to act under the superintendence and to obey the orders of a deputy whom he puts in his place, they are not engaged in a common work with the superintendent, and the master is liable for the superintendent's negligence. And this is eminently the case, with corporations which can only act through agents general and special."

The question still remains whether the negligent act of the train dispatcher in sending out the extra freight with a wrong order, and without a proper order, was the act of the superintendent. *Same - Same.* If the attempt here was to hold the superintendent personally liable for the negligence of the train dispatcher, we should have a very different question. But that is not the case. It is sought to hold the master liable because, by its rules, it made the train dispatcher's act the act and order of its superintendent or vice principal. By those rules it gave such act all the force, vigor, and effect as to its employees as if the train dispatcher's act was actually the act of its superintendent. Under such circumstances, it would hardly seem consistent for the master to turn around after such

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act brings fatal consequences, and say to the same employees that "the acts of the train dispatcher were not in fact the acts of the superintendent, though my rules said they were."

But assuming, as appellant's learned counsel do, that the train dispatcher's acts were not those of the division superintendent, it does not follow, as they contend, that the negligence of the train dispatcher was the negligence of a fellow servant with the decedent, thereby defeating a recovery. In the wide range of decided cases, both in this country and England, on this subject, the industry of the learned counsel for the appellant have only been able to cite two cases in support of their contention that a train dispatcher is a fellow servant with trainmen. Those cases are *Robertson v. Railroad Co.*, 78 Ind. 77, and *Railway Co. v. Frost*, 21 C. C. A. 186, 74 Fed. 965. The Indiana case, as is shown by the learned counsel, does not seem very satisfactory; especially as this court has since announced general principles of law pertinent to the point at total variance with that case, to which reference will hereafter be made. The opinion announces that a train dispatcher and a brakeman on a train in the employ of the railroad company were fellow servants, and therefore the negligence of the train dispatcher in failing to send proper orders to one of the trains involved, to side-track at a certain station, caused them to collide, injuring the plaintiff, who was a brakeman on one of the trains. Whether a train dispatcher or any other agent or employee of a railroad company is a fellow servant with other employees, or is a vice principal, must depend, not upon his superior authority, rank, or station, but must depend upon the nature of the duties the master has charged him with, or the power and authority with which the master has clothed him. As was said in *Railway Co. v. Snyder*, 140 Ind., at page 653, 39 N. E. 914: "Where the duty is one owing by the master, and he intrusts it to the performance of a servant or agent, the negligence of such servant or agent is the negligence of the master. As

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the master is charged with the duty of providing safe and suitable appliances, if he intrusts such duty to an employee, such employee becomes a vice principal, and his negligence in such matter is the negligence of the master. The rule which absolves the master from liability on account of the negligence of a fellow servant has no application,"—citing to the same effect: *Car Co. v. Parker*, 100 Ind. 181; *Krueger v. Railway Co.*, 111 Ind. 51, 11 N. E. 957; *Railway Co. v. Buck*, 116 Ind. 566, 19 N. E. 453; *Coal Co. v. Young*, 117 Ind. 520, 20 N. E. 423; *Railroad Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Taylor v. Railroad Co.*, 121 Ind. 124, 22 N. E. 876. And we add the following cases to the same effect: *Railway Co. v. Stern*, 140 Ind. 61, 39 N. E. 246, and cases there cited; *Robertson v. Railroad Co.*, 146 Ind. 486, 45 N. E. 655; *Railway Co. v. Berkey*, 136 Ind. 181, 35 N. E. 3. There is not a word said in the 78 Ind. case, above cited, why the train dispatcher in that case was a fellow servant with the injured brakeman on a train; nor is there any reference to any evidence showing the nature of the duties the train dispatcher was required to perform. Without some facts presented to the court, either by pleading or evidence, to show what the nature of the duties devolving on the train dispatcher were, there was no basis for the legal conclusion that he was a fellow servant with a brakeman. As is said by Wharton on Negligence (section 230): "But whether an employment is common to the injuring and the injured employee is a question of fact and not of law." From the face of the report in the case referred to in 78 Ind., *supra*, it would seem that the writer of the opinion proceeded upon the theory that whether a train dispatcher was a fellow servant or a vice principal was an unmingled question of law. Therefore we have examined the original record in that case, and find no such question as to whether the train dispatcher was a fellow servant with the injured brakeman or a vice principal of the railroad was involved or presented by the record in that case. At the close of the plaintiff's evidence, the defendant

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railroad company demurred to the evidence for insufficiency to make a case or sustain a complaint. The whole evidence is properly set out in the demurrer, and there is not one scintilla of evidence as to what the duties of the train dispatcher were; nor is there a particle of evidence that such train dispatcher had been guilty of any negligence or that he had left undone anything that duty required him to do, or that he had negligently or imperfectly performed any duty or service whatever in relation to the operation of the railroad in that case. Therefore the remarks of the learned commissioner in writing the opinion in that case, to the effect that the train dispatcher was a fellow servant, with the injured brakeman, were wholly *obiter dicta*, and no authority whatever. That question was treated as an open question by this court in *Railroad Co. v. Tohill*, 143 Ind., at page 57, 41 N. E. 711, in saying: "Not conceding that the complaint sufficiently alleges that the collision was due proximately to the negligence of the train dispatcher, and not deciding whether the train dispatcher and the deceased were fellow servants, we will proceed to examine the special verdict, upon the appellee's contention that it finds that the collision was due to the negligence of the train dispatcher." Therefore we feel warranted in saying that the question is an open one in this state up to this time. Hence it is not so surprising that appellant's counsel would try to support the dictum in 78 Ind., *supra*, by authority from outside of our state. But the one single case cited by them for that purpose is far more against than for their contention. That case, already named above, was by the circuit court of appeals of the United States for the Ninth circuit. That court said: "It is conceded that the train dispatcher, in giving notice of a change in the running of trains, acts for and in behalf of the railroad company. He is in that respect a vice principal, not because of his attitude to other employees as their superior, nor because he has charge of a department, but because of the nature of the duty which he discharges. He is for

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the time being clothed with the responsibility which rests upon the company to furnish its employees a safe place of operation. The ordinary running of a train is established by a fixed schedule, of which all operatives have notice, and by which their acts must be governed. When occasion arises to disturb the regular schedule, the duty rests upon the company to give timely notice to those that are to be affected thereby. This it is the office of the train dispatcher to do." There must be in all the boundless fields of adjudication on the subject an ominous dearth of authority supporting appellant's contention, or its learned counsel would not have felt constrained to offer for that purpose such authority as that just quoted. In that case, however, it was held that the failure of the operator to whom the train dispatcher transmitted it by wire to deliver the order to the proper train was the negligence of a fellow servant with the engineer on the train to whom the order was addressed by the train dispatcher. But even that holding was by a divided court. On the other point it was unanimous. The holding of this case on the question as to whether a train dispatcher is a fellow servant with trainmen, or a vice principal, under the facts there disclosed, from the nature of his duties, is strictly in harmony with the numerous cases in this court already cited above, holding that any servant or agent who performs duties owing by the master to his servants is not a fellow servant of such other servants, but acts for and in the place of the master, and as to such acts is a vice principal, regardless of his rank, power, or authority.

Let us see, then, what duties are devolved by law on the master in cases of this kind, and with what duties the train dispatcher was charged, and with what power he had been clothed by the master? Rule 190 requires him to "issue orders for the movement of trains in the name of the trainmaster, and must use care in sending telegraphic orders."

Rule 192 requires that he "must see that a correct register is kept of every train that passes each telegraph

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office, and that the train orders are properly recorded and filed for reference." Rule 193 requires that he "must see that train orders are transmitted in the manner and form prescribed." Rule 196 provides that, as far as practicable, he "must notify the telegraph operators and conductors and enginemen of all trains running in either direction of any extra trains on the road and their destination." Rule 199 provides that he "must not go off duty until relieved by another train dispatcher, to whom they (he) must explain the train orders outstanding, in writing, in ink, in a book kept for that purpose, and give any other information that may be necessary for his guidance. Relieving dispatcher must acknowledge his understanding in writing of all outstanding orders before going to work." The other findings and evidence show that all train orders were issued by the train dispatcher, and that he absolutely controlled all their movements; and especially and particularly he was charged with the duty of so ordering their movements as to avoid collisions, though he did this all in the name of the superintendent, under the rules of the company. This was a duty the master owed to its servants engaged in running and operating said trains. As was said by this court in *Railroad Co. v. Tohill*, *supra*: "We think it may be conceded to be the law that a railroad company operating a complicated system of trains is required to provide for the reasonable safety of operatives of such trains. * * * There are many authorities to the proposition that it is the duty of a railroad company to use ordinary care and prudence in making and promulgating reasonable necessary and sufficient rules for the safe running of its trains, and for the government of its employees, so as to furnish them a reasonable degree of safety, taking into consideration the nature of the service,"—citing a long list of cases. Accordingly Wharton on Negligence (section 233) says: "The master of men in dangerous occupations * * * is bound to provide for their safety." A railroad company is leg-

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ally bound to know, and therefore, in law, it does know the whereabouts of all its trains. As was said by this court in *State v. Indiana & I. S. R. Co.*, 133 Ind. 77, 81, 82, 32 N. E. 819: "The court judicially knows that telegraph lines are maintained, operated, and used in connection with railroads, and that it is necessary to do so to properly operate a railroad, and give advice as to the time of running trains, and the arrival of them at certain points along the line, and directing the running of trains and transacting the business of the road; that the telegraph is generally used, and is necessary, in connection with a proper system in operating a railroad. * * * The company * * * operates the whole line of road. It is present at every point along the line by its officers and servants. It knows at all times where its trains are." This knowledge it can only have through its train dispatcher. If there are any duties devolving upon a railroad employee, servant, or agent from the president down, more sacredly and imperatively due from employer to employees than others, we can think of none more imperative or more sacred than the duty to so order the running of trains in a complicated system of freight and passenger transportation both ways over a single track railroad, as was the case here, with numerous extra trains, as that collisions between opposing trains, entailing such fearful loss of life, limb, and property, may be avoided. No duty that the company can owe to its servants can be higher or more imperative than this; and this was the duty and power that the appellant had delegated to its train dispatcher to do and perform in the name of its superintendent. Whether the failure to properly discharge this duty was the negligence of the train dispatcher or superintendent can make no difference, because in either case it was a duty the master owed, and hence the failure and neglect was the master's failure and neglect, to the injury of its servant.

The overwhelming weight of authority is to the effect that a train dispatcher who controls and directs

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the movements of trains, as was the case here, is not a fellow servant of trainmen, but is a vice principal. In very many of the cases cited below the train dispatcher issued the orders in the name of the division superintendent. In addition to the case in 74 Fed., *supra*, we cite: Railroad Co. v. Barry, 58 Ark. 198, 23 S. W. 1097; McKune v. Railroad Co., 66 Cal. 302, 5 Pac. 482; Darrigan v. Railroad Co., 52 Conn. 285; Railroad Co. v. Young, 26 Ill. App. 115; Railroad Co. v. McLallen, 84 Ill. 109; Railroad Co. v. Kanaley, 39 Kan. 1, 17 Pac. 324; McLeod v. Ginther, 80 Ky. 399; Lasky v. Railway Co., 83 Me. 461, 22 Atl. 367; Hunn v. Railroad Co., 78 Mich. 513, 44 N. W. 502; Smith v. Railway Co., 92 Mo. 359, 4 S. W. 129; McChesney v. Railroad Co. (Sup.) 21 N. Y. Supp. 207; Hankins v. Railroad Co., 142 N. Y. 416, 37 N. E. 466; Sheehan v. Railroad Co., 91 N. Y. 332; Lewis v. Seifert, 116 Pa. St. 628, 11 Atl. 514; Washburn v. Railroad Co., 3 Head, 638; Railway Co. v. Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, and 24 S. W. 33; Phillips v. Railway Co., 64 Wis. 475, 25 N. W. 544; Crew v. Railway Co., 20 Fed. 87; Railroad Co. v. Clark, 6 C. C. A. 281, 57 Fed. 125; Dana v. Railroad Co., 92 N. Y. 639; Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184. The contrary is held to be the law in Mississippi and in Maryland in a qualified form. So that we are safe in saying that the overwhelming weight of judicial opinion is, that a train dispatcher, charged with the duties and clothed with the powers that the one now in question was, is not a fellow servant with trainmen in the employ of the railroad company, but is a vice principal, for whose negligence the company is liable. And, that being in harmony with principles of law long established in this court, we are of opinion that the train dispatcher in this case being charged with the performance of duties the master owed to his other servants, its trainmen, he was not a fellow servant with them, but acted for and in the place of the appellant company, and was a vice principal. The finding, therefore, in the special verdict, that the master, the appellant, did the negli-

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gent acts, and was guilty of the negligent omissions of duty, was well supported by the evidence. Therefore, even if the decedent's fellow servants in charge of the work train were guilty of negligence in not complying with rule 105 in running the same, the appellant was still liable, because its negligence in sending out the extra freight in violation of its rules was, at least, a joint, concurring, proximate cause with that of those running the work train, in producing the collision and death. It is settled law that the master is liable for the joint negligence of himself and the co-employee of the person injured. *Beach, Contrib. Neg. § 304; Railway Co. v. Lang, supra; Rogers v. Leyden, supra; Railway Co. v. Wynant, supra.* Therefore there was no error in overruling appellant's motion for judgment in its favor on the special verdict.

The error assigned on the action of the court in overruling the several demurrers to the several paragraphs of the complaint is unavailable, because the demurrer is not in the record. It is not contended, under the assignment, that the complaint does not state facts sufficient to constitute a cause of action, that all the paragraphs are bad; and such an assignment is unavailable unless they are all bad. But there is no substantial or tangible objection made in appellant's brief to any of the paragraphs. We conclude that there was no error in overruling the motion for a new trial and rendering judgment on the verdict. The judgment is affirmed.

Assignments of
Error.

NOTES.

Train Dispatchers—When Vice-Principals.—It is the duty of a railway company to know where its trains are, and to inform its servants, and warn them of what is necessary to avoid collision. Accordingly, where the superintendent of a railway company neglects to give proper orders to a working train to look out for a special train, this is the negligence of the company. And if an employee on such working train is injured he is entitled to recover, and the doctrine of fellow-servants has no application. *Galveston, Harrisburgh & San Antonio R. Co. v. Smith (Tex.), 44 Am. & Eng. R. Cas. 598.*

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A train dispatcher, who has control of a railroad or division thereof so far as the running and operating of trains thereon is concerned, and whose directions it is the duty of all employees on the train to obey, is not the fellow-servant of a fireman upon a train which is being operated under his direction. *Hunn v. Michigan Central R. Co.* (Mich. 1889), 41 Am. & Eng. R. Cas. 452.

A train dispatcher wielding the power and authority of a railroad company in the moving of trains, in the changing of schedules, or the making of new ones, as exigencies require, is not a fellow-servant with a train employee; and for his negligence, which is the proximate cause of an injury to such employee, the company is liable in damages. *Lewis v. Seifert*, 116 Pa. St. 628, 9 Cent. Rep. 755, 11 Atl. Rep. 514, 20 W. N. C. 145; *McKune v. California Southern R. Co.*, 17 Am. & Eng. R. Cas. 589, 66 Cal. 302; *Hunn v. Michigan C. R. Co.*, 41 Am. & Eng. R. Cas. 452, 78 Mich. 513, 7 L. R. A. 500, 44 N. W. Rep. 502; *McChesney v. Panama R. Co.*, 66 Hun 627, 49 N. Y. S. R. 148, 21 N. Y. Supp. 207.

A train dispatcher habitually performing the duties of a superintendent of the road represents the company in the same manner as it was represented by the superintendent, and must be deemed a vice-principal, although subject to his orders. *Lasky v. Canadian Pac. R. Co.*, 83 Me. 461, 22 Atl. Rep. 367.

The train dispatcher having determined that, under existing circumstances, a written order could not be given, and having given a verbal one, his act was that of the company, and binding on it. *Smith v. Wabash, St. L. & P. R. Co.*, 31 Am. & Eng. R. Cas. 331, 92 Mo. 359, 4 S. W. Rep. 129.

A printed rule of the company, under the head of "movement of trains by special orders," provided that all orders should be given by a superintendent, or by a dispatcher appointed for that purpose, under direction of a superintendent; and another that division superintendents were supreme in their respective divisions, and were responsible only to the management for such orders as they might give. *Held*, that the whole power of the company as to the movement of those trains being delegated to the train dispatcher, he was to be regarded as representing the company. *Darrigan v. New York & N. E. R. Co.*, 23 Am. & Eng. R. Cas. 438, 52 Conn. 285, 52 Am. Rep. 590.

A train dispatcher is not a fellow-servant with the brakeman. *Phillips v. Chicago, M. St. P. R. Co.*, 23 Am. & Eng. R. Cas. 453, 64 Wis. 475, 25 N. W. Rep. 544.

A train dispatcher of a railroad, who has the control of the movement of its trains, and to whose orders the conductors and engineers are subject, is the representative of the company, and is not a fellow-servant with those engaged in operating and moving the trains. *Smith v. Wabash, St. L. & P. R. Co.*, 31 Am. & Eng. R. Cas. 331, 92 Mo. 359, 4 S. W. Rep. 129; *Chicago, B. & Q. R. Co. v. Young*, 26 Ill. App. 115.

Train dispatchers and train masters are not the fellow-servants of locomotive firemen. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. Rep. 87.

A train dispatcher and material agent having authority to employ and discharge men, and direct movements of trains, is not a fellow-employee with an ordinary track laborer. *McKune v. California Southern R. Co.*, 17 Am. & Eng. R. Cas. 589, 66 Cal. 302, 5 Pac. Rep. 482.

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In *Lewis v. Seifert*, 116 Pa. St. 628, 9 Cent. Rep. 755, 11 Atl. Rep. 514, 20 W. N. C. 145, JUSTICE PAXTON, delivering the opinion of the court, said,—

"The distinction between general dispatcher, one who has the absolute control of all the trains upon the road, and the conductor or engineer of a train is manifest. The latter have the duty of obedience. Their business is to run their trains under orders from the dispatcher; and if an employee is injured as the result of their negligence, the company is not liable. They are in the same common employment, and are laboring together to the same end under orders from superior authority.

"The argument for the plaintiff in error, if carried to its logical conclusion, would wholly obliterate all distinction between railroad employees from the president down, as they all may be said to be in one sense in the same common employment, and paid by the same corporation.

"While the cases are not uniform upon this subject, the weight of authority is with the foregoing views. In addition to the authorities cited, we may refer to *Flike v. Boston & A. R. R. Co.*, 53 N. Y. 549; *Pittsburg, etc. R. Co. v. Henderson*, 5 Am. & Eng. R. Cas. 529; *McKinne v. Cal. South. R. R. Co.*, 21 Am. & Eng. R. Cas. 539; s. c., *sub. nom. McKune v. California Southern R. R. Co.*, 17 Am. & Eng. R. Cas. 389; *Phillips v. Chicago, etc., R. Co.*, 23 Am. & Eng. R. Cas. 453; *Phillips v. Chicago, etc., R. Co.*, 64 Wis 475; and *Washburn v. Nashville, etc., R. R. Co.*, 3 Head (Tenn.), 638.

"Against these authorities we have only *Robertson v. Terre Haute, etc., R. R. Co.*, 8 Am. & Eng. R. Cas. 175; and *Blessing v. St. Louis, etc., R. Co.*, 77 Mo. 410; s. c., 15 Am. & Eng. R. Cas. 298.

"These cases, however, do not sustain the broad principle contended for them; and, if they did, we would not be disposed to adopt them in the face of so much respectable authority the other way. Aside from authority, I am of opinion that the doctrine we have announced is founded upon the better reason, and is a rule both valuable and necessary for the preservation of the lives not only of railroad employees, but of the traveling public as well.

When Fellow Servants.—A train dispatcher is a fellow-servant of those engaged in the operation of trains under his orders. *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627.

A brakeman and a train dispatcher are servants in the accomplishment of the same general object, and are therefore fellow-servants, though situate many miles apart, and with distinct duties. *Robertson v. Terre Haute & I. R. Co.*, 8 Am. & Eng. R. Cas. 175, 78 Ind. 77, 41 Am. Rep. 552.

A train dispatcher is not, by virtue of his position, a representative of the company, but a fellow-servant, unless from the extent of discretion committed to him, or by the rules prescribed for his government, it should appear otherwise. *Hankins v. New York, L. E. & W. R. Co.*, 55 Hun 51, 28 N. Y. S. R. 59, 8 N. Y. Supp. 272.

A train dispatcher and a locomotive engineer are *prima facie* fellow-servants, and to entitle plaintiff to a recovery for the death of the engineer, through the train dispatcher's negligence, he must prove that they were not fellow-servants. *Blessing v. St. Louis, K. C. & N. R. Co.*, 15 Am. & Eng. R. Cas. 298, 77 Mo. 410.

An engineer or fireman of a railroad train is a fellow-servant of a train dispatcher. The company is not therefore ordinarily liable

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for the death or injury of the former occasioned by the negligence of the latter. *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515; *Chicago, etc., R. Co. v. Doyle*, 8 Am. & Eng. R. Cas. 171; *Robertson v. Terre Haute, etc., R. Co.*, 8 Am. & Eng. R. Cas. 175; *Rose v. Boston & Albany R. Co.*, 58 N. Y. 217; *Hodgkins v. Eastern R. R. Co.*, 119 Mass. 419.

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(*Court of Appeals of Kentucky, Feb. 5, 1898.*)

Injury to Employee—Admissibility of Evidence.*—In an action for damages for injuries sustained by plaintiff through defendants' alleged negligence in suffering its depot platform to remain out of repair, defendant excepted to the admission of evidence showing that it repaired such platform after the accident, but the admission of such evidence was not urged as one of the grounds for a new trial. *Held*, that the objection could not be considered on appeal.

Same.—Plaintiff's injuries having resulted from stepping into a hole in such platform, evidence of the existence of other holes in the platform prior to the accident, and that the attention of defendants' station agent had been called to them, was inadmissible.

APPEAL by defendant from Henderson county circuit court. *Reversed and remanded.*

Yeaman & Lockett, for appellant.

S. B. & R. D. Vance, for appellee.

WHITE, J. The appellee, Harry Henry, who was in the employment of appellant as switchman at Henderson, Ky., in September, 1894, while thus employed, fell into a hole in the passenger depot at Henderson, and broke the small bone of his leg, and received possibly other slight injuries. On account of this injury, appellee brought this action to recover damages. The cause of action stated is that, by reason of the negligence of appellant in suffering its depot platform to be and remain out of repair, the

Case Stated.

*See note at end of case.

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appellee suffered injury, he, at the time of the injury, exercising due care, and being ignorant of the defective platform and of the hole through which he fell. The defense was a denial of negligence, and a plea of contributory negligence. Upon a trial, before a Jury, appellee obtained a judgment for \$800; and, after appellant's reasons and motion for new trial were overruled, it prosecuted this appeal. Appellant's reasons for new trial are (1) error in refusing a peremptory instruction for defendant; (2) "the court erred in admitting evidence of the general condition of the platform on which plaintiff stumbled and fell"; (3) as to instructions given and refused; (4) verdict contrary to law, and not sustained by the evidence; (5) excessive damages.

As to the first and third reasons for new trial, we will say that, in our opinion, the instructions given express clearly the whole law of the case. They meet our entire approval. The verdict cannot be said to be flagrantly against the evidence, and it is only in such cases that this court will reverse for that error. The damages are not excessive, or so much so as to suggest prejudice in the jury.

Counsel for appellant, in their brief, urge as a reversible error the action of the trial court in admitting proof that appellant repaired the hole after the accident.

The bill of exceptions shows that this evidence was admitted over appellant's exception; but in the reasons for new trial the only error complained of in admitting evidence was that as to the general condition of the platform. While we incline to the opinion that evidence of repair should not be admitted, that objection cannot be considered on this appeal, as the error was not embraced in the motion for new trial.

Appellee was permitted, over the objection of appellant, to prove by witnesses that there were other holes in the platform than the one in which appellee was hurt,

and also that the attention of the station agent was called to these other holes some four or five weeks before this accident. This witness

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does not show whether those places were repaired or not, nor is it shown that these other holes had aught to do with the injury to appellee. The admission of this testimony is made a ground for new trial. We are of opinion that this evidence should not have been admitted. If, four or five weeks before the injury, holes were in the platform, and the attention of the agent was called to it, he might have fixed them; but, if he did not do so, these other holes were not in any way the cause, direct or remote, of appellee's injury; and although, in suffering these other holes to remain unrepaired, appellant might have been negligent, still, if it was not negligent by permitting the hole in which appellee was hurt, there can be no recovery. This is entirely unlike the testimony admitted in the case of *Railroad Co. v. Watson's Adm'r*, (Ky.) 21 S. W. 244. In that case the defects shown at other places were so close as to be connected with the accident causing the injury. In this there is no connection.

For this reason, the judgment is reversed, and cause remanded, with directions to set aside the verdict, and grant appellant a new trial, and for further proceedings consistent herewith.

NOTE.

Evidence of Subsequent Repairs—Admissibility.—Where a company is charged with negligence in allowing its freight yard to be out of repair, whereby the mule of a person delivering freight is injured, it is proper to allow evidence of repairs after the accident. Whether they should have been made before, or were rendered necessary by the accident, was a question for the jury. *Central R. Co. v. Gleason*, 69 Ga. 200.

Where an employee is injured while operating a machine, evidence that it was repaired shortly after the accident is competent as tending to show that it was unsafe at the time of the accident. *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. Rep. 484.

Where a company is sued for starting a fire by sparks from its engine, and the evidence tends to show that the burner was in a defective condition, it is proper to show that a change had subsequently been made, and that the dangerous emission of sparks ceased. *Alpern v. Churchill*, 53 Mich. 607, 19 N. W. Rep. 549.

In an action for injuries resulting from the alleged negligence of a company in neglecting to maintain in a safe condition a high-

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way crossing, in not replacing a plank which had been removed, it was proper to allow plaintiff to prove that after the injury defendant repaired the crossing by replacing the plank. *Kelly v. Southern Minn. R. Co.*, 6 Am. & Eng. R. Cas. 264, 28 Minn. 98, 9 N. W. Rep. 588.

Evidence of subsequent repairs of a gate by defendant is competent to show it was defendant's duty to repair, and if defendant wants it confined to that issue he should ask an instruction so confining it. *Woods v. Missouri, K. & T. R. Co.*, 51 Mo. App. 500.

Evidence of the repair of the track after an accident, when offered in chief by the plaintiff, and not in rebuttal of any proof made by the opposite party, is inadmissible. *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. Rep. 181.

In an action for an injury to an engineer, caused by a defective track, evidence of repairs to the track, which did not tend to show that the repairs had been made at the place of the accident, was properly excluded. *Knapp v. Sioux City & P. R. Co.*, 71 Iowa 41, 32 N. W. Rep. 18.

In an action by a passenger for injuries sustained by the derailment of the train, evidence that defendant, several months after the accident, repaired its road in various places by putting in new rails and ties, is inadmissible; and the plaintiff's evidence should be confined to the condition of the roadbed at the place and in the immediate vicinity of the accident at the time it occurred, and he should not be allowed to show that accidents had previously occurred on other parts of defendant's road. *Hipsley v. Kansas City, St. J. & C. B. R. Co.*, 27 Am. & Eng. R. Cas. 287, 88 Mo. 348.

Evidence of repairs of a railroad track made six months after an injury charged to result from a defect therein is inadmissible in an action for such injury. *Mahaney v. St. Louis & H. R. Co.*, 108 Mo. 191, 18 S. W. Rep. 895; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1.

BROWN

v.

CHICAGO, R. I. & P. RY. CO.

(*Supreme Court of Kansas, Feb. 5, 1898.*)

Injury to Employee—Chargeable with Notice of Defects—Assumption of Risk.*—The plaintiff was an experienced switchman in the yards of the railway company, where there was a repair shop, and tracks upon which broken and disabled cars were placed for repair. A defective car had been placed on one of these tracks to be repaired, and in an attempt to uncouple it from another car plaintiff was injured by a broken coupling attachment. *Held*, that the mere fact that the car was out of repair with the knowledge of the company

*See notes at end of case.

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is not sufficient to establish actionable negligence on the part of the company. *Held*, further, that when plaintiff found the car upon the repair track he was, in effect, warned that the car was defective, and unsuitable for ordinary use; and must, therefore, be taken to have assumed the risks incident to the handling of broken and disabled cars.

Pleading Negligence.*—The plaintiff cannot claim or recover damages upon grounds of negligence other than those alleged in his petition.

(Syllabus by the Court.)

ERROR by plaintiff to Leavenworth county superior court. *Affirmed*.

Fenlon & Fenlon (*Benj. F. Endres*, of counsel), for plaintiff in error.

M. A. Low, W. F. Evans, and *J. E. Dolman*, for defendant in error.

JOHNSTON, J. While William H. Brown was uncoupling two cars in the yards of the Chicago, Rock Island & Pacific Railway Company at Horton, two of his fingers were injured to such an extent as to require amputation. In an action against the company to recover damages, he alleges that the injury was the result of the company's negligence, and the specific and only negligence alleged is that "it permitted, through its agents and employees, said car No. 3956 to be and remain out of repair, knowing the same to be in a defective condition, in that the strap which held the Jenny coupler was out of repair, unfastened, and out of place, thus permitting the coupler to sag and fall below its regular and right position, so that, when it came in contact with the coupler of another car, the coupler of said other car overlapped it, and caught said plaintiff's hand, causing the injury aforesaid." At the trial the plaintiff produced his proof, but the court held it to be insufficient, and sustained a demurrer to his evidence.

It appeared that the plaintiff had been in the service of the company for several years, and had been employed as a switchman in the Horton yards for nearly nine months before the occurrence of the accident. Some of the repair shops of the company are located at Horton,

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and in connection with them there are several repair tracks, upon which broken or injured cars are placed for the purpose of repair. The defective car which plaintiff attempted to uncouple was upon one of these tracks, and had been brought there for repair. We think the plaintiff failed to establish a case of actionable negligence on the part of the company. The fact that the car was out of repair did not imply negligence. In general, it is the duty of a railway company to furnish suitable and reasonably safe machinery and appliances; and if it fails to do so, and injury results therefrom to an employee, he may, if free from fault, recover from the company for his injuries. That rule is not applicable in a case like this. It applies to cars that are in general use, and not to those which have been withdrawn from service, and brought in for repair. All know that cars are frequently broken and injured by use, and when that occurs both duty and interest require that the company shall cause them to be repaired, and made reasonably safe for use. To accomplish this, it is necessary that they should be removed to the repair shops, and it is necessary that employees shall assist in moving them. As a general rule, an employee who handles such cars with knowledge of the defects will be held to have assumed the risks incident to such work. One who is employed to handle broken and disabled cars cannot shut his eyes to the hazardous character of the service, nor invoke the above-mentioned rule which requires the company to furnish safe machinery and appliances. In order to conform to the requirements of that rule, the company must bring in broken and disabled cars, and repair them. When they are placed on the repair tracks, the employees regularly engaged in handling damaged cars have at least some notice of their condition and of the risk to be run in handling them. When the plaintiff found the car on one of these tracks, he was, in effect, warned that for some reason the car was unsuitable for ordinary use, and that he must, therefore, exercise greater care,

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and he will be held to have assumed greater risks.

It is averred that the company knew of the defective condition of the car, and that the plaintiff had no knowledge of it; but he had no right to assume that the car was safe. Finding it upon a repair track, he is required to proceed as if it was defective in some particular, and unsuitable for ordinary use. The fact that the car was damaged, and had been put aside for repairs, and that the company knew of its condition, is not enough to establish actionable negligence. There is nothing to show that the damaged condition of the car was due to the carelessness of the company, nor that the original construction was faulty; neither is it shown by whom or by what means it was broken. The plaintiff can make no claim on account of inexperience. He was a man of mature years who had been in the service of the company for a considerable time. He was familiar with the yards, and the methods employed. He knew the location of the repair tracks, and the purpose for which cars were placed thereon. In his petition there is no averment that the company was guilty of negligence in failing to notify him of the particular defect in the car, or that he was misled in any way as to the character of the defect by the action of the company. In the argument it was urged that the company was negligent in failing to place upon the car the mark "B. ^{Pleading Negligence.} O.," or "Bad Order." It was contended that, as some of the cars on these tracks had been repaired, or were in good condition, such a designation was necessary and customary. Whether under the circumstances, some designation of that character is necessary, or whatever may be the rule with respect to it where its absence is relied upon, it certainly is not available as a ground of negligence in the present case. The failure to so mark the car is not alleged by plaintiff as a ground of negligence, and he cannot rely on other than those alleged as a basis of recovery. But aside from that, it appears from testimony given by one of plaintiff's witnesses that there was a mark of "Bad Order" on the side of the car.

Notes

Some claim is made that the car was placed upon the repair track to have a side-board put in, and not for the repair of the coupling attachment, and that, as this was noted in the car inspector's book, it operated to mislead the plaintiff. It appears, however, that he did not see the book until after the accident, and, whatever it may have contained, he could not have been misled by it.

Our conclusion is that the plaintiff failed to show that his injury was caused by the negligence of the company, and therefore the ruling of the district court must be sustained. As tending to sustain the conclusion reached, the following cases are cited: *Flanagan v. Railway Co.*, 45 Wis. 98; *Id.*, 50 Wis. 462, 7 N. W. 337; *Kelley v. Railway Co.*, 35 Minn. 490, 29 N. W. 173; *Yeaton v. Railroad Corp.*, 135 Mass. 418; *Railroad Co. v. Ward*, 61 Ill. 130; *Arnold v. Canal Co.*, 125 N. Y. 17, 25 N. E. 1064; *Watson v. Railway Co.*, 58 Tex. 434. The judgment of the district court will be affirmed. All the justices concurring.

NOTES.

Employee Chargeable with Notice of Defects—Assumption of Risk.—Where a company is in the habit of taking damaged cars from one station to another for repairs, and a person is employed to couple and switch such cars, and while so engaged is injured by reason of the broken condition of a car, the presumption is that he undertook the employment subject to all the risks incident to the place and that this was one of the risks he expected to incur when he accepted the employment. *Chicago & N. W. R. Co. v. Ward*, 61 Ill. 130, 12 Am. Ry. Rep. 434; *Watson v. Houston & T. C. R. Co.*, 11 Am. & Eng. R. Cas. 213, 58 Tex. 434.

An employee so engaged assumes the risk of injury by mistaking a damaged car for a sound one, whether it result through accident, or the error or omission of a fellow servant. *Fraker v. St. Paul, M. & M. R. Co.*, 15 Am. & Eng. R. Cas. 256, 32 Minn. 54, 19 N. W. Rep. 349; *Yeaton v. Boston & L. R. Corp.*, 15 Am. & Eng. R. Cas. 253, 135 Mass. 418.

Plaintiff was a brakeman employed in defendant's yards at S.; there were inspectors whose duty it was, on the arrival of every train in the yard, to examine each car, and if any injury or defect was discovered, to remove the car from the train and place it upon a track known as the "cripple track" for repairs, and in this work plaintiff was employed. In attempting to couple two cars, one of which had a broken draw-head, in order that the latter might be placed on said track, plaintiff was injured. The defect might easily

Notes

have been seen. *Held*, that the action was not maintainable; that plaintiff took the necessary risk of his employment, one of the purposes of which was to handle and remove disabled cars; that under the circumstances he had no right to assume that the couplings were perfect; if he did not know the condition of the one which caused the injury, he was bound to assume that it might be disabled and govern his action accordingly, and so was chargeable with negligence. *Arnold v. Delaware & H. Canal Co.*, 125 N. Y. 15, 25 N. E. Rep. 1064, 34 N. Y. S. R. 372.

A company is not liable to its employee for injuries received while running a defective engine to a machine shop for repair, if he knew of the defect which made the repair necessary. When the employee is not chargeable with the knowledge of such defect, the question of negligence in the use of the defective engine is to be decided by the jury. *Houston & T. C. R. Co. v. O'Hare*, 64 Tex. 600.

Pleading Negligence.—Where the action is based upon negligence, it is sufficient if the complaint sets forth generally that the accident was the result of defendant's negligence, and it is not necessary to set out the particulars constituting such negligence. *Clark v. Chicago, B. & Q. R. Co.*, 4 McCrary (U. S.) 360, 15 Fed. Rep. 588; *Andrew v. Chicago & N. W. R. Co.*, 45 Ill. App. 269; *St. Louis & S. E. R. Co. v. Mathias*, 50 Ind. 65, 8 Am. Ry. Rep. 381; *Pittsburgh, C. & St. L. R. Co. v. Nelson*, 51 Ind. 150; *Louisville, N. A. & C. R. Co. v. Jones*, 28 Am. & Eng. R. Cas. 170, 108 Ind. 551, 9 N. E. Rep. 476; *Ohio & M. R. Co. v. Walker*, 32 Am. & Eng. R. Cas. 121, 113 Ind. 196, 15 N. E. Rep. 234, 12 West Rep. 731; *Louisville & N. R. Co. v. Wolfe*, 80 Ky. 82; *Otto v. St. Louis, I. M. & S. R. Co.*, 12 Mo. App. 168; *Eldridge v. Long Island R. Co.*, 1 Sandf. (N. Y.) 89. *Contra*, see *Devino v. Central Vt. R. Co.*, 63 Vt. 98, 20 Atl. Rep. 953.

A general allegation of negligence, without stating the acts constituting negligence, is good against a demurrer. *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. Rep. 347, 4 U. S. App. 121, 1 C. C. A. 286; *Cleveland C., C. & I. R. Co. v. Wynant*, 100 Ind. 160; *Hammond v. Schweitzer*, 112 Ind. 246, 11 West Rep. 661, 13 N. E. Rep. 669; *Louisville, N. A. & C. R. Co. v. Cauley*, 119 Ind. 142, 21 N. E. Rep. 546; *Ohio & M. R. Co. v. McCartney*, 121 Ind. 385, 23 N. E. Rep. 258; *Ohio & M. R. Co. v. Craycraft*, 5 Ind. App. 335, 32 N. E. Rep. 297.

But where the pleader sees fit to specify the grounds of negligence, he will be confined in his proofs to the facts thus specified. *Ravenscraft v. Missouri Pac. R. Co.*, 27 Mo. App. 617; *Schneider v. Missouri Pac. R. Co.*, 75 Mo. 295; *Atchison v. Chicago, R. I. & P. R. Co.*, 80 Mo. 213.

An allegation in a pleading that the party complained against negligently committed the particular act, or negligently omitted to do a particular thing, which led to the injury for which redress is sought, is sufficient without pleading all the facts and circumstances from which negligence could be inferred. *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213, 28 N. E. Rep. 328; *Mack v. St. Louis, K. C. & N. R. Co.*, 77 Mo. 232; *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520.

But the act which is characterized by negligence must be stated. *Ohio & M. R. Co. v. Engerer*, 4 Ind. App. 261, 30 N. E. Rep. 924; *Wills v. Cape Girardeau S. W. R. Co.*, 44 Mo. App. 51; *Woodward v. Oregon R. & N. Co.*, 18 Oreg. 289, 22 Pac. Rep. 1076; *Missouri Pac. R. Co. v. Hennessey*, 42 Am. & Eng. R. Cas. 225, 75 Tex. 155, 12 S. W. Rep. 608.

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A petition in an action against a railroad company for personal injury growing out of the alleged negligence of the servants of the company must show to which servant or servants of the company negligence is imputed, and fully and definitely state what acts or omissions of such servants constitute the negligence complained of. *Atchison, T. & S. F. R. Co. v. O'Neil*, 49 Kan. 367, 30 Pac. Rep. 470.

A declaration for negligent injury must aver the fact and the manner of negligence, and plaintiff should be confined to what is set forth in his declaration. *Marquette, H. & O. R. Co. v. Marcott*, 41 Mich. 433.

In actions on the case for negligence the plaintiff is bound to set out in his declaration the combination of material facts relied on as a cause of action, and to follow up the allegation by evidence pointing out and proving the same combination of circumstances, in order to apprise the parties and the court of the precise subject of the controversy. *Denman v. Johnston*, 85 Mich. 387, 48 N. W. Rep. 565.

JONES

v.

NEW YORK, N. H. & H. R. Co.

*(Supreme Court of Rhode Island, June 23, 1897.)***Injuries to Employee—Defective Grab-Iron—Verdict and Evidence.**

—In an action by a railroad employee against the company for personal injuries, plaintiff testified, and he was corroborated by another witness, that a grab-iron was loose at one end; and that his fall from the car was the result of such defect. This evidence was uncontradicted, though defendant attempted to discredit such witness. *Held*, that a verdict for plaintiff would not be disturbed as against the evidence.

Same—Evidence of Subsequent Condition of Grab-Iron.—Testimony to show that such grab-iron was in good order six days after the accident was inadmissible, there being no evidence offered to show that it was in the same condition then as at the time of the accident.

Same—Admissibility of Evidence.—Though the declaration did not allege that plaintiff's injuries were the result of defendant's failure to furnish a sufficient number of hands to run the train, evidence as to the number of hands on the train was admissible to show that plaintiff was properly in the position where the accident took place.

Defects—Inspection of Foreign Cars.*—Defendant was responsible for the condition of such grab-iron, though it was on a foreign car, the defect having been discoverable by reasonable inspection.

Inspection of Foreign Cars.—See 9 Am. & Eng. R. Cas., N. S., 759, and note 788 *et seq.*

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Newly Discovered Evidence.—The alleged discovery of evidence where it is not shown that its production at the trial was impossible or of evidence which merely tends to impeach or discredit plaintiff's testimony, is not sufficient ground for a new trial.

MOTION for new trial by defendant. *Denied.*

Walter B. Vincent and Herbert A. Rice, for plaintiff.
Frank S. Arnold, for defendant.

MATTESON, C. J. The only testimony as to how the accident happened is that of the plaintiff. His statement is that, as he was climbing the car, the grab iron on top of the car, as he laid hold of it, being loose at one end, swung around, and he was, in consequence, precipitated to the ground. The plaintiff is corroborated in his statement by the testimony of the witness Rollins to the extent that the grab iron on the car from which the plaintiff testifies that he fell was loose at one end. There is no direct testimony in contradiction of that of the plaintiff and of Rollins, but the defendant sought to discredit it by attempting to show that the plaintiff had made statements shortly after the accident to one witness that he did not know how it occurred, and to other witnesses that he was injured by the giving way of a brake wheel in setting the brake, and by attempting to show that the testimony of Rollins was inconsistent with his conduct after the accident. The credit to be given to the plaintiff's testimony and to that of Rollins was for the determination of the jury. Their verdict being in favor of the plaintiff, it is not for us to disturb it on the ground that it is against the evidence in this respect.

Injuries to Employee—Defective Grab-Iron—verdict and Evidence.

We find no error in the refusal of the common pleas division to permit the defendant to put in testimony to the effect that when the car arrived at Altoona, Pa., on December 31, 1895, six days subsequently to the accident, certain repairs were made upon it, but that the grab iron was not out of repair and no repairs were made on that. The travel of the car after the accident had not been

Same—Evidence of Subsequent Condition of Grab-Iron.

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shown by the testimony beyond New Haven, and the offer was not accompanied by any offer to show that the car was in the same condition at the time it arrived in Altoona that it was when it left New Haven ; or in other words, that no repair of the grab iron had been made between New Haven and Altoona. If the grab iron was defective, as testified by the plaintiff and Rollins, and consequently dangerous to the employees of the defendant or other railroad corporations over which the car might be transported, it is not improbable that it may have been repaired subsequently to the accident during its transit.

We do not think that the common pleas division erred in admitting the evidence of the plaintiff on the question as to whether the train had its full complement of trainmen on the date of the accident. The ground of objection was that the declaration did not allege that the accident was due to a lack of the requisite number in the crew in charge of the train, but merely the defective condition of the grab iron. The purpose of the testimony was not to show that the accident was occasioned by the lack of a sufficient number of men to properly handle the train, but to show that the plaintiff was properly in the position on the train in which he was at the time of the accident to rebut any claim which might be made by the defendant to the contrary, as the basis of a contention that the plaintiff was guilty of contributory negligence. We think the testimony was admissible for the purpose.

The defendant contends that, if the plaintiff's injuries were occasioned in the manner alleged, they were occasioned by the act of a fellow servant, and therefore that the plaintiff is not entitled to recover.

Defects—Inspection of Foreign Cars.

It is argued that, as the car belonged to another corporation, the defendant's car inspectors employed by it were as to the plaintiff, in so far as the inspection of this car was concerned, fellow servants ; and hence, in the absence of any claim, that such inspectors were not competent,

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that the plaintiff cannot maintain an action for an injury resulting from a failure of the former to perform their duty. There is a wide diversity of opinion in relation to the obligation of a railroad company to inspect the cars of other companies received by it for transportation. The cases relating to the subject are collected in 3 Elliott, R. R. § 1279, notes. It seems to us that the better view, as well as that sustained by the weight of authority, is that laid down in *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344. This view is that a railroad company "is bound to inspect foreign cars just as it would inspect its own cars"; that "it owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects, or refuse to take such cars. So much, at least, is due from it to its employees. The employees can no more be said to assume the risks of such defects on foreign cars than on cars belonging to the company. As to such defects the duty of the company is the same as to all cars drawn over its road." The court adds that this rule is neither onerous, inconvenient, nor impracticable. It requires, before the train starts, and while upon its passage, the same inspection and care as to all the cars on the train. The defect complained of in the present suit was one which could have been discovered by reasonable inspection, and one, therefore, which it was the duty of the defendant, under the rule stated, to have ascertained and remedied. Having failed in its duty in this respect, it is liable to the plaintiff for the injuries to him which have ensued.

We do not think that the evidence alleged to be newly discovered, as set forth in the affidavits filed and accompanying photographs, is such as to entitle the defendant to a new trial.

No reason appears why the fact that the box car 16,500, T. H. & I., was constructed with side ladders

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instead of end ladders could not have been proved at the trial. At least one of the witnesses (Kipple) Newly Discovered Evidence. called for the defendant, had seen and inspected this car prior to the trial, and, for aught that appears, his testimony on the point might have been taken, if inquiry, concerning it had been made. Moreover, the effect of the testimony is merely to impeach or discredit that of the plaintiff that the car from which he fell had end ladders, and it has been repeatedly held that a new trial will not be granted for newly discovered evidence which goes merely to discredit or impeach the testimony of a witness. *Francis v. Baker*, 11 R. I. 103; *Dexter v. Handy*, 13 R. I. 474; *Roberts v. Roberts*, Index RR, 169, 33 Atl. 872. But, aside from these technical suggestions, the evidence is not sufficiently conclusive in itself to warrant a new trial. It is designed to establish that car 16,500, T. H. & I., had side ladders, and not end ladders; the purpose being to argue from this that the plaintiff's testimony was false or mistaken, because he said in his testimony that the car from which he fell had end ladders, and that he thought it was car 16,500, T. H. & I. The plaintiff did not pretend to state positively that the car from which he fell was that designated as "16,500, T. H. & I.," and it is evident that his knowledge as to the marks upon the car was derived from some one subsequently to the accident. His affidavit filed at the hearing states that this information was obtained from the conductor of the train in September, 1896, long subsequently to the accident. But it is not pretended that the conductor had any knowledge of the position in the train of the car in question save that afforded by his train book, which contained a record of the cars composing the train. It does not appear that any reason existed for a record in the train book of the precise order in which the cars were arranged in the train, and, in the absence of such reason, it is not to be presumed that especial care was taken to have the cars entered in the train book in the exact order of their position in the train; and, if not, the evidence of the train book, while it may

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be accurate as to the cars in the train, is not conclusive as to the position of any particular car; and hence car 16, 500, T. H. & I., may not have been in the position in the train of the car from which the plaintiff testifies that he fell, and, if not, it may not have been that car. New trial denied, and case remitted to the common pleas division with direction to enter judgment for the plaintiff on the verdict.

HAYES

v.

SOUTHERN PAC. CO.

(*Supreme Court of Utah, June 20, 1898.*)

Opinion of Expert—Admissibility.—Where buildings used exclusively in the business of railroading are peculiar and more or less complicated structures, and their construction requires skill in the mechanic arts, and is outside the knowledge and experience of ordinary jurors, the opinion of an expert witness on the question whether or not such buildings were carefully and properly constructed is admissible.

Injury to Employee—Evidence of Subsequent Experiments—Admissibility.*—H., an employee of a railroad company, while walking on the company's track located along the center of a passageway between its coal bins, was struck by an engine while standing on the side of the track against the bins, whither he had gone to permit the engine to pass. The passageway was shown to be 12 feet 2 inches wide. The beam of the engine which struck H. was 9 feet 1 inch wide. Afterwards the company placed F., as near as possible, in the same position as H. was when he was struck and injured, and ran another engine with the same length of beam as the one which struck H. past him, to determine by experiment that a man could stand there in safety while such engine passed him. Both engines were run at a low rate of speed. The railroad track and bins were in the same position at the time of the accident and of the experiment. In an action brought by H. against the company to recover damages for injuries sustained by him, both H. and F. testified before the jury, and could be observed by them. *Held*, that the court committed no reversible error by permitting the company to introduce evidence of the experiment.

(Syllabus by the Court.)

APPEAL by plaintiff from Weber county district court. *Affirmed*.

*See notes at end of case.

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J. H. & H. R. MacMillan, for appellant.*Marshall, Royle & Hempstead*, for respondent.

Case Stated. BARTCH, J. The plaintiff was on the 18th day of November, 1894, in the employ of the defendant company at Carlin, Nev., as a coal heaver. His work had to be performed in the company's coal sheds, and consisted in supplying the tenders of engines with coal whenever they were run into the sheds for that purpose. The coal sheds were constructed with a railroad track through them, so as to enable the running of engines into them for coaling purposes. It appears that coal bins were on both sides of the track, and that the passageway or space for the track, according to plaintiff's testimony, was 12 feet 2 inches wide. On the day above mentioned the plaintiff attempted to pass through this passageway, on the track to the round-house, for a purpose of his own, and was struck by the beam of an engine in the sheds while standing on the side of the track, against a coal bin, where he had gone, on the approach of the engine, as a place of safety, and received the injuries of which he complains. The witness Fitzgerald testified that the beam on the engine which struck the plaintiff, by measurement, was 9 feet and 1 inch in length. There is also evidence tending to show that it was a practice for employees, with the knowledge of the company, to pass through the sheds on the track. The plaintiff, claiming that he was injured through the negligence of the defendant in the construction of its coal sheds, brought this action to recover damages. At the trial the jury returned a verdict of "no cause of action." Hence this appeal.

The first assignment of error which we will consider relates to the admission of evidence. The court permitted the witness Fitzgerald, over the objection of counsel for the plaintiff, to answer the following question: "From your experience as a railroad engineer and your experience as a civil engineer, please state whether those sheds were carefully and properly built for the purposes for

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which they were erected." Counsel for the appellant insists that this action of the court was erroneous, because, as they maintain, it was calling for the opinion of the witness on a question that the jury was to determine. No objection appears to have been interposed on the ground that the witness was not an expert, and therefore it may be assumed that he was competent to give expert testimony. The general rule is that a witness must testify to facts, and not conclusions. To this rule, however, there are exceptions, and we think this question falls within the exceptions. The contention of the appellant at the trial was that the coal sheds were negligently constructed. This was controverted by the respondent, and thus one of the main issues was whether they were properly erected for the purpose for which they were intended. Now, it is apparent from the evidence that these sheds are peculiar and more or less complicated structures,—results of mechanical skill, —and appear to be necessary for, and used exclusively in, the business of railroading. Thus, the very nature and use of the structure precludes the idea that the average layman is competent to judge of their proper or improper construction. It was therefore permissible to resort to the opinion of a person possessed of such requisite mechanical skill and experience as enabled him to form a correct judgment as to whether or not the sheds were carefully and properly constructed. The building of such sheds for the purpose of railroading is not a subject of general knowledge, but it depends so far upon skill in and knowledge of the mechanic arts, outside the knowledge and experience of ordinary jurors, as to render the opinions of those who are competent, from special training in the art of construction, and experience, to form them, admissible. This is so because of the difficulty in placing before jurors unskilled in such matters a state of facts which would enable them to draw correct conclusions without the aid of such opinions. And such opinions are not in all cases confined to experts. "There is a growing tendency to the doctrine, if it be

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not already established, that opinions of ordinary witnesses may be given upon matters of which they have personal knowledge in all cases in which, from the very nature of the subject, the facts, disconnected from such opinions, cannot be presented to a jury as to enable them to pass upon the question with the requisite knowledge." *Suth. Dam.* § 442; *Rog. Exp. Test.* § 108; 1 *Greenl. Ev.* § 440; 7 *Am. & Eng. Enc. Law*, 509, 510; *Mangum v. Mining Co.*, 15 *Utah*, 534, 50 *Pac.* 834; *Wright v. Pacific Co.*, 15 *Utah*, 421, 49 *Pac.* 309; *Scattergood v. Wood*, 79 *N. Y.* 263; *Walker v. Fields*, 28 *Ga.* 237; *Railroad Co. v. Johnson*, 38 *Ga.* 409; *Railway Co. v. Lanham*, 27 *Ind.* 171. We conclude that the court committed no error in permitting an answer to the question.

Counsel for the appellant further insist that the court erred in permitting the witness Fitzgerald to answer the following question, over their objection:

"Mr. Fitzgerald, will you please state, whether you yourself have ever stood inside that shed, at or near the place where the accident was testified to have occurred, while an engine with those beams entered and passed you?" This question was objected to on the ground that the experiment was not shown to have been made at the same place, and with the same engine, and because made with a different man, and not shown to have been made at the same rate of speed. As to the location, the evidence shows that the place of the accident was pointed out to the party, who stood in the passageway to make the experiment, and that he stood, as near as was possible to ascertain, in the same place where the plaintiff stood at the time of the injury; and there is no question that the passageway, railroad track, and sheds were still the same, and had not been changed. While it appears a different engine was used in the experiment, still it is shown that the beam which struck the plaintiff was of the same length as those on the engine used. So the men were different, it is true; but both

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were witnesses, and testified before the jury, who having had an opportunity for observation and comparison, had no occasion to be misled to the plaintiff's prejudice. There was a difference in the rate of speed, but both engines were running at a low rate,—the one which caused the injury, according to the plaintiff's testimony, at seven or eight miles per hour, while the other was running at a lower rate on the occasion of the experiment. From all the facts in evidence, it seems difficult to see how the difference in the rate of speed could make any material difference in the space between the engine and the side of the coal bin where each man was standing when the engine passed. However this may be, the experiment was performed simply for the purpose of ascertaining whether a man could stand there in safety while the same kind of an engine which caused the injury was passing, or, in other words, for the purpose of measuring the space between the engine and the side of the bin. This appears from other evidence as well; for the plaintiff testified that the passageway was 12 feet and 2 inches wide, and the witness Fitzgerald that the beam which struck the plaintiff was 9 feet and 1 inch long. It will be noticed that this left a space of $18\frac{1}{2}$ inches between each end of the beam and the side of the coal bin; the bins being situated on each side of the passageway, and the circumstances in evidence indicating that the track was laid along in the centre of the passageway. It would seem, therefore, by simple mathematical demonstration, without the aid of the experiment, that there was sufficient space, where the appellant was injured, to permit a man of even more than average size to stand, while an engine was passing, without being necessarily exposed to injury. This even though the engine surged 3 or 4 inches while passing as testified by the plaintiff, which, however, seems improbable, at a rate of speed at which an engine must necessarily run at that point in order to stop within the coal shed. Under all the facts and circumstances of this case appearing in the record, we are of the opinion that the court committed no reversible er-

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ror in permitting the question here under consideration to be answered, although it behooves a court to exercise a great caution in the admission of such testimony.

The appellant also insists that the court erred in allowing a certain witness to answer questions respecting the population of the town of Carlin, where the accident occurred; the purpose for which the coal sheds were erected; the purpose for which they are used by the defendant company; and whether the coal sheds were erected to be used as a common passageway for people, and for the convenience of the public. It seems clear from an examination of the pleadings and evidence, that none of these questions, nor any of the answers thereto, could prejudice the rights of the appellant: and therefore, whether subject to the objections interposed or not, they cannot constitute reversible error. The judgment is affirmed.

ZANE, C. J., and MINOR, J., concur.

NOTE.

Evidence of Results of Subsequent Experiments—Admissibility.—Where the point in issue is whether a car moving slowly down an inclined plane with brakes set would, when the brakes were suddenly loosed, jump or spring forward, it is error to exclude from the evidence the result of an experiment made at the same place and under the same conditions. *Chicago, St. L. & P. R. Co. v. Champion*, (Ind.) 32 N. E. Rep. 874.

In an action for an injury at a crossing, while driving a team at a walk, the evidence showed that trains on defendant's road could have been seen when plaintiff was crossing the track of another road a short distance away. *Held*, that evidence of experiments of how long it would take a team of horses to walk the distance between the two tracks was admissible, both for the purpose of showing how fast plaintiff was driving, and how fast the train was running. *Nosler v. Chicago, B. & Q. R. Co.*, 73 Iowa 268, 34 N. W. Rep. 850.

After the testimony of defendant's station agent, where the accident occurred, that he had held such position prior to the time of the accident and up to the time of the trial, and did not know of any change in the switch in question having been made, one of the plaintiff's attorneys was permitted to testify as to the result of his measurements of the distance between the rails at the switch fourteen months after the accident, and of experiments made by him in placing his foot between the rails, and showing where the foot could be caught and

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where not, the shoe worn by the intestate being before the jury at the time. *Held*, that the evidence was competent. *Brooke v. Chicago, R. I. & P. R. Co.*, 81 Iowa 504, 47 N. W. Rep. 74.

The defendant called a witness who had made an experiment to see how a person placed on the step of a car as the plaintiff in his testimony described himself to be placed, would fall upon the car being suddenly started, and the witness testified that the falling was in a direction different from that testified to by the plaintiff. *Held*, competent evidence for the jury to consider in determining on the conflict of evidence as to the manner in which the accident happened. *Gilbert v. Third Ave. R. Co.*, 22 J. & S. 270, 8 N. Y. S. R. 152.

Where evidence was given on the trial of statements made by the deceased, that at the time of the injury his boot froze to the rail, and he was unable to pull it away, the court properly refused to permit a witness to testify that, after the statements were made in his hearing by the deceased, he experimented and found that the weather had the same effect on his boot, it not being shown that the experiment was made under the same conditions that existed when the injury took place. *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. Rep. 564.

WHATLEY

v.

MACON & N. RY. CO.

(*Supreme Court of Georgia, July 20, 1898.*)

Foreign Pauper Affidavits—Appeal.—A pauper affidavit cannot be filed in the supreme court; nor will this court, after a record from the lower court has been completed, and the transcript thereof sent here receive or consider original certificates purporting to have been signed by officials in another state, the purpose of which is to show the official character of the person by whom a paper filed as such an affidavit in the court below was attested.

Injury to Employee—Ordered into Obvious Danger*—Assumption of Risk.—A servant of a railroad company, though he may be, in a general sense, under the duty of obeying the orders of a conductor, is not bound to obey an order when so doing will manifestly subject him to peril. A general order from a conductor to a flagman to "catch" a car will not justify the latter in attempting to do so at a time when the car is moving at an obviously dangerous rate of speed. Especially is this so when the conductor, when giving the order, was not aware of the speed at which the car would be running when the flagman was expected to catch it, and was not present when the latter attempted to do so.

The trial court was right in granting a nonsuit.

(Syllabus by the Court.)

*See note at end of case.

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ERROR by plaintiff from Morgan county circuit court.
Affirmed.

G. B. Whatley, McAlpin & La Roche, and George & George, for plaintiff in error.

Hill, Harris & Birch, for defendant in error.

FISH, J. 1. A pauper affidavit, or what purported to be one, was filed in the court below. It appeared to have been made in Aiken county, S. C., before the judge of probate of that county, but the official character of the person administering the oath was not authenticated. Under the act of 1870 the official attestation of such an officer to an answer, plea, or other defense would be *prima facie* evidence, in a court of this state, of his official character. Civ. Code, § 5060. But this act only applies to the verification of such matters of defense as the law requires to be sworn to, and leaves the law with reference to other affidavits made in another state as it stood before this act was passed. This court held in *Behn v. Young*, 21 Ga. 208, that an affidavit, administered in Florida, verifying the statements in the bill for injunction, cannot be recognized here when the official character of the person administering the oath is not authenticated. This decision was followed in *Charles v. Foster*, 56 Ga. 612, where it was held: "A claim affidavit and bond, purporting to be executed in another state before a notary public thereof, cannot be received by a levying officer in this state without due authentication," and that "the seal of the notary public is not authentication, nor is the certificate and seal of the clerk of a court of record, without a further certificate from the judge, chief justice, or presiding magistrate of such court." It follows that no legal pauper affidavit was filed in the lower court. To escape the payment of costs in this court, such an affidavit must be filed in the clerk's office of the trial

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court (Civ. Code, § 5881), "and a certified copy thereof * * * transmitted to this court with and as a part of the transcript of the record, or, if no transcript is required, with the bill of exceptions" (*Id.* § 5613; *Thorpe v. State*, 92 Ga. 470, 17 S. E. 693). The plaintiff in error has offered here what purport to be certificates from the clerk and the judge of the court of common pleas of Aiken county, S. C., the purpose of which is to show the official character of the person who attested the paper which was filed as a pauper affidavit in the court below. As the affidavit must be filed in the court below, so it must be authenticated there; in other words, it must be in a condition to be recognized and accepted as an affidavit in that court. An attempt is made to vitalize the affidavit here. What it needed was life in the court where the case was tried. Without vitality there, it can have none here. There was no legal affidavit in the lower court, and this court will not receive or consider the certificates offered for the purpose of showing here what ought to have been shown there, *viz.* that the person who in South Carolina attested the paper filed below as a pauper affidavit was an official authorized by the law to do so. The plaintiff in error also sought to file a pauper affidavit in this court, in which he swore that, at the date when the paper filed as such an affidavit in the trial court purports to have been made, he was unable to pay the costs, etc., and that he is still unable to do so. According to a constitutional provision, the pauper affidavit necessary in order to avoid the payment of the costs in the supreme court must be filed in the court below. Civ. Code, § 5881. What should be brought to this court is, not an affidavit, but the legal evidence of the existence of one in the court from which the case comes. Consequently this court will not receive or consider an affidavit which has never been filed in that court.

2, 3. There was no error in granting a nonsuit. The plaintiff sued the railway company for injuries alleged

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to have been sustained by him while in its employment as a flagman on a freight train, "and subject to do the work of a train hand, upon the order of the conductor of said train." His evidence showed that at the time when he was so seriously injured he was attempting a perilous performance. He undertook to "catch" a freight car which was moving at considerable speed,—to grasp the ladder on the car, and climb to its top, for the purpose of putting on the brakes. If we accept his own theory as to why he fell to the ground and was run over, it appears that when he caught the ladder and attempted to raise his foot into the stirrup for the purpose of climbing up, he was jerked down by the momentum of the rapidly moving car. The plaintiff's witness Johnson, who seems to have been the engineer of the train, testified: "I kicked the car for Whatley to catch. Did not know it was detached. Had I known it was detached, I would not have kicked it as fast as I did. I kicked it at the rate of seven or eight miles an hour. Car ran about four car lengths beyond place of accident. A car is kicked in the following manner: Uncouple a car from train or engine, then push it back, and while in motion stop the engine, and let the uncoupled car roll on to the place where it is wanted." The plaintiff himself testified: "The cause of my injury was the rate of speed at which the car was going, which I could not ascertain when I went to catch it. It is not customary to send cars back that fast. They are usually sent back slowly, so that you can catch them and put the brakes on." He also testified: "It went four or five car lengths after it ran over me." We think it is apparent from this testimony that any man of ordinary sense and prudence would have known that it was dangerous to attempt to grasp the ladder on a freight car moving at the speed at which this car was going, and attempt to ascend to its top; and the plaintiff, who testified that he had been previously employed as a passenger conductor on another railroad, and "had been railroading for some time," certainly

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must have known it. He says that the cause of his injury was the rate of speed at which the car was going, which, in effect, is to say that it was dangerous to catch and try to mount to the top of a freight car which at the time was moving at such speed. It is true that he says he could not ascertain this rate of speed when he attempted to catch the car. If he could not ascertain it, who could? He was right at it. He saw it moving. He was trying to catch it. His testimony shows that it was not moving slowly, for, he says, "it is not customary to send cars back that fast, and that they are usually sent back more slowly, so that you can catch them and put the brakes on." Clearly, he was not without fault in the matter. In explanation and justification of his reckless act, he says he was obeying the order of the conductor, who was his superior. Although the conductor ordered him to catch the car, he was not bound to obey this order, if he saw that to attempt to do so would manifestly subject him to peril. *Roul v. Railway Co.*, 85 Ga. 197, 11 S. E. 558, and cases cited. Besides, the conductor, after ordering this car to be cut loose, and directing the plaintiff to catch it, ran to the railroad office to get orders, and was not present when the car was set in motion, nor when plaintiff attempted to catch it, and therefore could not have known at what rate of speed it was moving. So it cannot be said that the conductor ordered him to catch the car while it was moving at a speed which rendered it dangerous for him to do so. That the court committed no error in granting a nonsuit, under the facts disclosed by the plaintiff's evidence, see *Roul v. Railway Co.*, *supra*, and the cases therein cited. Judgment affirmed. All the justices concurring.

NOTE.

Servant Ordered into Obvious Danger—Assumption of Risk.—In *George v. Mobile, etc., R. Co.* (Ala., 1896), 19 So. Rep. 784, 4 Am. & Eng. R. Cas., N. S., 258, *abstr.*, it was said: "There can be no question, we think, that for a switchman to go into the small and irregular space which intervenes between the base beam of a pilot to an

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engine, which is pushing a car along as fast as a man can walk, and the car to which such engine is thus coupled, and to undertake to walk there while he uncouples the car from the engine, with the pilot immediately upon his heels, is negligence on his part, in and of itself, and to be so declared by the court as matter of law, though he may have been expressly ordered to do that thing in that particular way by one to all whose reasonable and proper orders he was bound to conform. * * * And upon the same principle the supposed emergencies of the railroad's business, requiring that the work of switching should be done in this way, because more expeditious, would not justify the doing of this obviously and greatly dangerous act." Citing *Kresnowski v. Railroad Co.*, 18 Fed. Rep. 229; *Davis v. Railway Co.* (Ala., 1895), 18 So. Rep. 173; *Warden v. Railroad Co.*, 94 Ala. 277.

If a master or vice-principal orders an employee into a situation of danger, and he obeys and is injured, he cannot be held to have assumed the risk, unless the danger was so obvious that no prudent man would have obeyed the order. *Miller v. Union Pac. R. Co.*, 12 Fed. Rep. 600, 6 Am. & Eng. R. Cas., 614; *abstr.*, *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285, 28 Am. & Eng. R. Cas. 528.

AKESON

v.

CHICAGO, B. & Q. R. Co.

(Supreme Court of Iowa, May 26, 1898.)

Employee Injured by Co-employee—"Use and Operation" of Railroad—Construction of Statute.*—Where an employee is injured by the negligence of a co-employee in moving against him a plank used by them as a bridge between an engine on the main track and a car standing on another track, and from which they were at the time coaling the engine, the act of negligence is one connected with the "use and operation" of the railroad within the meaning of section 1307 of the Code of Iowa of 1873; the purpose of moving such plank having been that of enabling the engine to start.

APPEAL by defendant from Montgomery county district court. *Affirmed.*

Smith McPherson, for appellant.

J. M. Junkin, for appellee.

*As to the construction of Sec. 1307, Code of Iowa (1873), see 9 Am. & Eng. R. Cas., N. S., 9, *note*.

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LADD, J. For about 2½ years before the month of August, A. D. 1892, when the accident in question occurred, the plaintiff had worked for the defendant in its coal house at Red Oak. His duties required him to shovel coal from the cars into the chutes, to break the coal, and wet it for use, and to assist in filling the tenders of locomotive engines with coal. In the month referred to, the coal house was rebuilt; and while that was being done, tenders were supplied with coal from cars which were placed on the coal track next to the main line. The sides of the coal cars were about four feet high, and when a tender was to be loaded, it was run onto the main line track, opposite the coal car. A bridge was made by placing together two planks (each of which was about ten feet in length, one foot in width and two inches in thickness) in such manner that one end of each plank rested on top of the coal car, and the other on top of the tender. The bridge thus made was nearly level, and was used by plaintiff and a co-employee in passing from the car, with a box which was provided with handles at each end, and was filled with coal, and in returning with the empty box after its contents had been dumped into the tender. On the day of the accident, a locomotive engine in charge of an engineer and fireman was run up to the coal car for coal, and a bridge was made, and the tender filled by the plaintiff and his co-employee, Forshay, in a manner described. When that work was finished, Forshay remained on the tender, as he frequently did, for the purpose of riding on it to the water tank, to get water for the engine, while the plaintiff returned over the bridge to the coal car. As he was about to step from the bridge to the car, Forshay picked up a plank and shoved it into the car. The plaintiff claims that the plank caught one of his feet, and made him fall or jump into the car in such a manner as to cause a double hernia, and the evidence tends to sustain that claim. The verdict and judgment in his favor were for the sum of \$1,500. The assignment of the claim in suit to Carrie Akeson has been shown, and she has been substituted as party plaintiff.

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The liability of the defendant depends upon the meaning and application of section 2071 of the Code (section 1307, Code 1873), which is as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

The evidence tends to show that the accident was occasioned by the negligence of Forshay. It is said, however, that this was in no manner connected with the use and operation of the railway. The court instructed the jury "that, at the time the injury complained of occurred, the plaintiff was working for defendant, loading coal into the tender of what is called a 'live engine,' with the help of some co-employees. When so doing he and his co-employees were engaged in operating defendant's railway." In argument, nearly all of the authorities construing the statute set out are reviewed, and it is respectively contended that, under previous decisions, this case falls within and without its purview. For the purpose of determining this controversy and in order to deduce a rule, if possible, in harmony with the meaning of the legislature, we shall consider somewhat in detail what has heretofore been said in construing this statute. In 1862 the first act modifying the common law was adopted. It provided that "every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employees of the corporation to any person sustaining such damage." Laws 1862, p. 198. Prior to this, an employee could not recover from the company damages occasioned by the

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negligence of a co-employee in the same service. *Sullivan v. Railroad Co.*, 11 Iowa, 421; *Jones v. Railroad Co.*, 16 Iowa, 6; *Hunt v. Railroad Co.*, 26 Iowa, 363. The constitutionality of this statute was passed upon in *McAunich v. Railroad Co.*, 20 Iowa, 338, and there placed upon precisely the same ground as stated by CHIEF JUSTICE FULLER in *Railroad Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, when construing a similar statute of the state of Kansas. In *Ney v. Railroad Co.*, 20 Iowa, 347, contractors and persons engaged in constructing the roadbed and in laying down ties and rails are held not to be engaged as employees in operating the road.

The court, in order to uphold the constitutionality of the law in *Deppe v. Railroad Co.*, 36 Iowa, 52, limited the term "employees" to those engaged in operating the railroad, saying, through COLE, J.: "The manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further, it becomes unconstitutional." *Johnson v. Railway Co. (Minn.)* 45 N. W. 156; *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161; *Railroad Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585; *Bucklew v. Railway Co.*, 64 Iowa, 603; 21 N. W. 103. The case was decided under the act of 1862. Deppe was engaged in shoveling dirt on mud cars, and sometimes went with the train to unload, and at other times remained at the bank to undermine with a pickaxe. The bank was about 20 feet high from the rock on which he stood to shovel. While shoveling loose dirt, the bank caved down, and injured him. In holding that he was entitled to recover, this language was used: "It is true, he was not injured while or by operating the train; but neither the act itself nor the constitutional limitation requires us to put this very narrow construction upon it. The plaintiff was employed for the discharge of a duty which exposed him to the perils and hazards of the business of railroads; and, although the injuries did not arise from such

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hazards, they cannot be separated from the employment. If the plaintiff had been employed exclusively for shoveling or loading the dirt, he could not recover, although he might have ridden to and from his work on the cars. The ground we rest our affirmance upon is that where the employment is entire, and a part of the continuous services relates to the perilous business of railroading, it brings the case within the meaning of the statute and its constitutional limit." The soundness of this decision is questioned in *Malone v. Railway Co.*, 61 Iowa, 326, 16 N. W. 203 and is upheld in the same case reported in 65 Iowa, 422, 21 N. W. 759, wherein it is said: "To meet the objection that the act of 1862 created a rule of liability which was applicable to railroad companies alone, and did not affect other employees under precisely the same circumstances, and that it was therefore class legislation, and in violation of the state constitution, the court, in *Deppe's Case*, construed the act as creating a remedy only in favor of that class of employed who were engaged in the hazardous business of operating railroads; and the correctness of the holding of that case on that question is not doubted. But the subsequent legislation has established a new rule as to the class of acts for which the companies are liable. So that, to entitle an employee now to recover against the company for injuries which he has sustained in consequence of the negligence or mismanagement or willfulness of a co-employee, he must show (1) that he belonged to the class of employees to whom the statute affords a remedy, and (2) that the act which occasioned the injury was of the class of acts for which a remedy is given. We think it very clear that the plaintiff has failed to establish the latter fact." *Deppe's Case* may then, not be deemed controlling in determining what is meant by the use and operation of a railroad. Discrimination has not been made in citing this case in subsequent opinions. It has been referred to as holding that the negligence occasioning the injury need not necessarily be connected with the movement

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of trains, cars, or machinery on the tracks without calling attention to the change in the statute. That the employment at the time of the injury must have exposed the complainant to the hazards of railroading, without reference to what he may be required to do at other times, is no longer questioned. *Butler v. Railroad Co.*, 87 Iowa, 206, 54 N. W. 208; *Keatley v. Railroad Co. (Iowa)* 63 N. W. 560; *Canon v. Railway Co. (Iowa)* 70 N. W. 755. It may be well to say, however, that the statutes of Minnesota and Kansas are like that construed in *Deppe's Case*. See *Lavallee v. Railway Co. (Minn.)* 41 N. W. 974; *Railroad Co. v. Pontius (Kan. Sup.)* 34 Pac. 739. In *Johnson v. Railway Co.*, 45 N. W. 156, the supreme court of Minnesota, after mature consideration, held that the statute "only applies to those employees who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers." With one exception, recovery has not been permitted in any case in this state, other than *Deppe's*, where the wrongful act causing the injury was not occasioned by the actual movement of trains, cars or machinery on the track. *McKnight v. Construction Co.*, 43 Iowa, 406; *Frandsen v. Railroad Co.*, 39 Iowa, 372; *Handelun v. Railway Co.*, 72 Iowa, 709, 32 N. W. 4; *Nelson v. Railway Co.*, 73 Iowa, 576, 35 N. W. 611; *Larson v. Railway Co.*, 91 Iowa, 81, 58 N. W. 1076; *Haden v. Railway Co.*, 92 Iowa, 226, 60 N. W. 537; *Pierce v. Railway Co.*, 73 Iowa, 140, 34 N. W. 783. On the other hand, there are numerous cases holding that, although the complainant was engaged in work on a railroad, he may not recover. In *Potter v. Railway Co.*, 46 Iowa, 399, a person injured while moving an engine driver in the shop was held not to have been injured in the operation of the road. *Smith v. Railroad Co.*, 59 Iowa, 73, 12 N. W. 763. The plaintiff was not entitled to recover when injured while engaged in loading a car on the track with timber. To the same effect, see *Schroeder v. Railway Co.*, 41 Iowa, 344. In the same case reported

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in 47 Iowa, 375, it appeared the plaintiff was injured by the movement of cars, and he was permitted to recover. In *Malone v. Railway Co.*, *supra*, it was held that assisting in closing the door of the round-house after the engine had entered was not included in operating a road. *Luce v. Railway Co.*, 67 Iowa, 75, 24 N. W. 600. The plaintiff, in hoisting coal for the purpose of filling a car by means of a crane, was not engaged in the operation of the road. In *Stroble v. Railway Co.*, 70 Iowa, 560, 31 N. W. 66, the court, speaking through BECK, J., said: "This negligence, to render a corporation liable, must be of an employee and affect a co-employee, who are in some manner performing work for the purpose of moving a train, as loading or unloading it, superintending, directing, or aiding its movement. The persons must be connected in some manner with the moving of trains. Work preparatory thereto, which may be done away from a train, is not connected with its movement. The statute, it will be observed, holds the corporation liable for the negligence of a co-employee which is 'in any manner connected with the use and operation of any railway.' What is the use and operation of a railway? It is constructed for the sole purpose of the movement of trains. That is its sole use. What is the operation of a railway? They can be operated in no other way than by the movements of trains." The first three sentences were quoted with approval in *Butler v. Railroad Co.*, *supra*, as holding that the party injured must be exposed to the hazards of railroading. ROTHROCK, J., in *Pyne v. Railroad Co.*, 54 Iowa, 223, 6 N. W. 281, said: "We think the proper test in determining the question is: Does the duty of the employee require him to perform services which expose him to hazards peculiar to the business of using and operating a railroad? If it does, and, while in the line of his duty, he, by the negligence of a co-employee, receives an injury from a passing train or from other appliances used in the use and operation of the road, he may recover." In *Foley v. Railroad Co.*, 64 Iowa,

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644, 21 N. W. 124, the same judge used this language: "With the exception of Deppe's Case, all the actions in which this court has determined that railroad companies are liable in this class of cases are those where the injury was received by the movement of cars or engines upon the track." In *Larson v. Railway Co.*, 91 Iowa, 81, 58 N. W. 1076, the court, through GIVEN, J., says that "an examination of the cases preceding that of Stroble will show that in none of them was it held that the use and operation of a railroad were limited to the movement of what are commonly known as 'trains'. The cases are all grounded upon the view that the statute applies when the employment and the wrong are connected with the handling of railroad machinery moved upon railroad tracks." In that case the injury was occasioned by the moving of a hand car. See *Railroad Co. v. Artery*, 137 U. S. 507, 11 Sup. Ct. 129. In *Nelson v. Railway Co.*, *supra*, the plaintiff was injured while operating a ditching machine on a railroad. The use and operation of a railroad does not consist in the movement of trains alone. It is within the statute if the injury is occasioned, as said in *Larson's Case*, "in handling the railroad machinery moved upon a railroad track." In *Butler's Case* it is said by KINNE, J., after reviewing many previous decisions: "In the cases heretofore cited, it has repeatedly been held that this statute was intended for the protection and benefit of employees, who, from the very nature of their employment, are exposed to the hazards peculiar to the business of using and operating a railroad." The only dangers peculiar to railroading are those occasioned by the movement of the engines, cars, and machinery on the track, or directly connected therewith. It is evident that the statute contemplates such injuries only as are caused by the negligent acts of employees so engaged. In no other proper sense is a railroad used and operated. The exception referred to is that of *Smith v. Railway Co.*, 78 Iowa, 583, 43 N. W. 545. There the plaintiff was a snow shoveler, and, while not shoveling, rode in the caboose. The water-closet of this was filled

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with shovels and picks. The light of the engine faced towards the caboose. In pressing necessity, the plaintiff, finding the closet in this condition, went on the platform to relieve himself. This was covered with snow and ice, and, being for the moment blinded by the headlight, he was unable to see the bridge. He slipped and fell to the ground below. The court, through ROBINSON, J., says: "The placing of tools in the water-closet, the stopping of the caboose on the bridge, the failure to notify the occupants of its position, and permitting ice and snow to accumulate on the platform, were matters connected with the use and operation of the train, and hence of the railway. He would not have been hurt had he not been on the train in the discharge of his duties. The services of himself and others were required, and, in order that the train might be moved, and when the tracks were cleared of obstructions, he was obliged to ride on the train. We think he was within the statute." To hold that the injury must have been caused by the actual movement of the cars, engines, or machinery, to come within the protection of the statute, would be giving too narrow a construction to the words "in any manner connected with the use and operation of any railway." Besides, as shown, such a conclusion would be contrary to previous adjudications, repeatedly cited and approved by this court. The rule in Minnesota, with a statute by construction like ours, is that "if there is any substantial element of hazard or condition of danger which contributed to the injury, and which is peculiar to the railroad business, the statute applies." *Nichols v. Railway Co.* (Minn.) 62 N. W. 386; *Leier v. Transfer Co.* (Minn.) 65 N. W. 269; *Blomquist v. Railway Co.* (Minn.) 67 N. W. 804.

The peculiarity of the railroad business, which distinguishes it from any other, is the movement of vehicles or machinery of great weight on the track by steam or other power, and the dangers incident to such movement are those the statute were intended to guard against. If, then, the injury is received by an employee whose work exposes him to the hazards of moving

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trains, cars, engines, or machinery on the track, and is caused by the negligence of a co-employee in the actual movement thereof, or in any manner directly connected therewith, the statute applies, and recovery may be had. Beyond this, the statute affords no protection. The purpose of the lawmakers was evidently not to make men, because employed by railroad companies, favorites of the law, but to afford protection owing to the peculiar hazards of their situation. That the plaintiff's employment exposed him to the peculiar dangers of railroading admits of no doubt. The important question is whether if Forshay, causing the injury, was so immediately connected with and incident to the movement of the engine and tender as to come within the statute. We think it was. The engine had been detached from an incoming train, and was moved opposite the coal car. Over these the coal was carried in boxes, and, when this work was done, these were necessarily taken from the tender to enable the engine to move from the main track. In doing this, Forshay picked up and pushed one of the planks just as the plaintiff was about to step on the coal car, and, to save himself, the latter was compelled, in order to avoid this plank, to jump sidewise among some boxes below. The very purpose of removing the plank was to enable the engine to move, and if, in doing this, Forshay was negligent, such negligence was so closely connected with the movement as to come within the terms of the statute. Indeed, it is difficult to conceive of a case when not in the actual movement of an engine is more directly connected therewith. The other issues were properly submitted to the jury. We discover no error in the record, and the judgment is affirmed.

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REDDINGTON

v.

CHICAGO, M. & ST. P. R. Co.

(Supreme Court of Iowa, May 28, 1898.)

Employee Injured by Co-Employee—"Use and Operation" of Railroad—Construction of Statute.*—Where a brakeman is assisting, from a platform near the track, a co-employee in coaling the engine, and is injured through the negligence of his co-employee, such negligence is connected with the "use and operation" of the railroad within the meaning of section 1307 of the Code of Iowa of 1873.

APPEAL from Cerro Gordo county district court.
Reversed.

S. P. Miles, Smith & Pollans, Stanberry & Clark,
and *Sullivan & Longley*, for appellant.

J. C. Cook and Blythe, Markley & Smith, for appellee.

GIVEN, J. 1. The facts shown by the evidence necessary to be noticed are these: On and for some time prior to November 1, 1894, the plaintiff was in the employment of the defendant as head brakeman on a freight train, and on that day was so employed on a train running west from North McGregor to Mason City. Defendant had at different stations, including the station of Monona, coal sheds from which to supply its engines, at each of which one or two men, known as "coal heavers," were employed to have the coal ready, and to put the same on the engines, or to assist in doing so. Where there was but one coal heaver employed at the shed, as was the case at Monona, it was the duty of the head brakeman to assist him in coaling the engine drawing the train on which the brakeman worked. At Monona the coal was put into large iron buckets.

*See *Akeson v. Chicago, B. & Q. R. Co.*, *ante*, and *foot-note*.

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and placed in position on an elevated platform by means of a derrick with a windlass, preparatory to the coming of engines for coal. In coaling an engine at Monona, the coal heaver stood on the ground at the foot of the derrick, and worked the windlass, so as to raise and lower the buckets, and assist in swinging them to and from the engine by turning the derrick. It was the duty of the head brakeman, in assisting in coaling the engine of his train at Monona, to go upon the elevated platform, to give signals to the man at the windlass when to hoist and lower the buckets; to hook the derrick chain to a full bucket, give a signal to hoist it, and, when sufficiently lifted, to aid in swinging it around over the tender; to open the spring that holds the bottom of the bucket; to replace the bottom when the bucket was emptied; and to aid in swinging it around to place on the platform. It was while thus employed that plaintiff was injured. He had hold with both hands of an empty bucket that had been lifted above his head, and was walking backward with his head under the bucket, pulling it toward him, for the purpose of swinging it into place. Without signal from him, the bucket was lowered so as to strike him, and knock him off the platform to the ground, about eight feet below, by reason of which he was injured. At the time this occurred, the engine and train were standing still, the engineer being on the ground, oiling the engine, and the fireman engaged in drawing clinkers from the fire box. The negligence charged is that, while plaintiff was so employed, "the said Anderson negligently and recklessly let loose of said crank, which he was then managing, for the purpose of raising and lowering said buckets, while said bucket was being moved back to said coal shed, after the same had been unloaded, without any notice or warning whatsoever that he intended so to do."

2. Section 1307 of the Code of 1873, under which this action is brought, is as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of the such

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corporation, in consequence of the neglect of agents or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." There is no question but that plaintiff's employment as head brakeman exposed him to the hazards of operating the railroad, nor is it questioned that his employment as brakeman required him to assist in coaling the engine at Monona. The contention is whether the wrong charged was in any manner connected with the use and operation of the railroad. In the case of *Akeson v. Railroad Co.* (decided at the present terms) 75 N. W. 676, said section and the cases arising under it were carefully reviewed, and also cases from other states under similar statutes. After quoting from *Butler v. Railroad Co.*, 87 Iowa, 206, 54 N. W. 208, to the effect that the statute is for the protection and benefit of employees who, from the nature of their employment, are exposed to the hazards peculiar to the business of using and operating a railroad, we said: "The only dangers peculiar to railroading are those occasioned by the movement of the engines, cars, and machinery on the track, or directly connected therewith. It is evident that the statute contemplates such injuries only as are caused by the negligent acts of employees so engaged. In no other sense is a railroad used and operated." The facts of this case, we think, bring the plaintiff within the provisions of the statute as thus construed. The work in which he and Anderson were engaged was directly connected with the movement of the engine, and the hazards therefore peculiar to the use and operation of the railroad. This case is unlike *Luce v. Railway Co.*, 67 Iowa, 75, 24 N. W. 600, as in that case the plaintiff was not employed nor engaged in connection with the movement of machinery on the

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track. The case of *Stroble v. Railway Co.*, 70 Iowa, 560, 31 N. W. 63, is more in point. Our conclusion is that the court erred in sustaining defendant's motion for a verdict. Reversed.

ROBINSON, J. (dissenting). I do not think the admitted facts bring the plaintiff within the provisions of section 1307 of the Code of 1873.

LOUISVILLE & N. R. Co.

v.

GINLEY.

(*Supreme Court of Tennessee, Feb. 24, 1898.*)

Authority of Conductor to Employ Hands In Case of Emergency—Liability of Company for Injury to Such Employees.—As a general rule, the conductor of a railway train is without authority to employ servants for the company he represents; but in a clear case of emergency a conductor has such authority by implication of law; and where such an employee is injured through the negligence of the conductor in permitting the cars to be run together with unnecessary violence, the company is liable.

ERROR by defendant to Montgomery county circuit court. *Affirmed.*

Burney & Bailey, for plaintiff in error.

Leech & Savage, for defendant in error.

CALDWELL, J. Patrick Ginley recovered a judgment for \$800 against the Louisville & Nashville Railroad Company for personal injuries to his minor son, John, while temporarily in its employment as a brakeman. The railroad company appealed in error, and presented several reasons for asking a reversal and new trial. Among these reasons, and the only one that need be considered in this opinion,—the other being considered orally,—is the alleged want of authority on the part of the conductor, on whose invitation John Ginley

*See note at end of case.

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claims to have entered the service, to make the employment for the company. There is no proof in the record, though containing all the evidence, that the conductor, who is alleged to have made the employment in question, had express authority from the company to engage persons for its service. Hence the company's counsel contend that there is, in no event, any ground of liability on its part for the injuries received by John Ginley; and, consequently, that the judgment is without legal support, and should be reversed. To determine whether or not this contention is sound, requires a more elaborate statement and consideration. As a general rule, the conductor of a railway train is without authority to employ servants for the company he represents; and, to justify his act in so doing, when questioned, it must ordinarily be shown that especial authority therefor was expressly conferred. Yet emergencies may sometimes arise, in which the proper management, operation, and protection of his train imperatively require other or additional service. In such cases his contracts of employment will bind the company upon the ground of implied authority. Elliott aptly illustrates the emergency doctrine as applied to the acts of a conductor, and gives his own opinion of it, in the following passage: "Thus he [the conductor] may, where other provision has not been made, employ mechanics to repair a break of the cars or machinery which must be repaired before the train can proceed to its destination, and may engage men and teams to render the roadway or bridge secure for the passage of his train, when weakened or partially swept away by unforeseen causes; but in such cases the authority to contract does not exist unless there is an urgent necessity for immediate action. It is the necessity which confers authority, not simply the position of conductor. Doubtless he may, in case of the sudden death or disability of the engineer, engage a competent engineer to take the train to a point where another engineer in the employ of the company can be obtained, if such employment be an urgent necessity, and required to avoid disaster or serious injury to the

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company. It has been held that the conductor has authority, when the regular brakeman is sick or absent, and the proper and safe management of the train so requires, to supply the place of the sick or absent brakeman, and render the substitute so employed an employee of the company for the time being; but we suppose this doctrine can only apply in very rare cases, for, as a general rule, a conductor has no authority to employ agents or servants for the company. The authority of the conductor to enter into contracts for the company is created by the necessity for the exercise of such authority, and as soon as the emergency is passed the authority terminates." 1 Elliott, R. R. pp. 408, 409, § 302. Whether or not John Ginley was employed in an emergency in the legal sense indicated, and, consequently, under the conductor's implied authority, is a question of fact yet to be considered, and in whose determination by this court after an affirmative verdict by the jury, that legitimate view of the evidence most favorable to the plaintiff will be taken as true. *Transit Co. v. Seigrist*, 96 Tenn. 120, 33 S. W. 920; *Railroad v. House*, 96 Tenn. 557, 35 S. W. 561. The accident in which the plaintiff's minor son received the injuries in this suit complained of occurred in the company's yard at Clarksville, while the crew of one of its freight trains was engaged in switching. As the train moved out of the siding, it "broke in two," and the rear portion, comprising several cars, was running backward, unattended, down grade, and at such a rate of speed as to greatly imperil the detached cars by derailment at a switch, or by collision with stationary cars on the siding, unless sooner arrested in their increasing momentum. Seeing this danger, and none of the regular crew being near enough to perform the needed service, the conductor called to young Ginley, who was passing by, and who had occasionally done work for the company, and asked him to board the detached cars and stop them. The boy, thereupon, promptly mounted the cars, and soon succeeded in stopping them before they had done any harm, and with-

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out any injury to himself. This having been accomplished, the conductor, who was in command, and fully advised of the situation, negligently permitted the front portion of the train to be run against the cars that just had been stopped, with such violence as to knock to the ground the boy, who was in the act of descending with due care and caution, and cause some of the wheels to pass over one of his arms, whereby amputation was made necessary, and his services to his father were rendered less valuable. These facts unmistakably show a clear case of emergency, in which the conductor, by implication of law, has authority, and was in duty bound to employ any suitable person at hand, to save a valuable part of the train in his charge from impending danger or destruction. The interest of the company in respect of the detached cars, to say nothing of other trains that might have been endangered, and of the welfare and safety of the public, imperatively demanded immediate remedial action on the part of the conductor, and that taken by him was the best calculated to arrest and prevent a hurtful catastrophe. It follows, therefore, that John Ginley was upon the detached cars rightfully in the capacity of a brakeman, and not wrongfully as a trespasser, and that the company is liable in damages to his father for the injuries inflicted in the manner stated, in so far as they may have impaired the value of the son's services to his father.

It has been held that a conductor has implied authority to employ a necessary brakeman in the place of one who is absent from his train with or without cause. (*Sloan v. Railway Co.*, 62 Iowa, 736, 16 N. W. 331), or as a substitute for one who is sick (*Railway Co. v. Propst*, 83 Ala. 518, 3 South, 764 ; *Id.* 85 Ala. 203, 4 South, 711), and that the company is liable to the person so employed for injuries received by him while performing its service under the direction of the conductor (*Id.*). The doctrine of these cases was recognized, though found not applicable, in *Church v. Railway Co.*, 50 Minn. 220, 221, 52 N. W. 647. It has also

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been held upon the same ground—that of emergency—that a conductor has implied authority to employ a surgeon to attend an injured brakeman, and that the company will be liable for the surgeon's fees. *Railroad Co. v. McMurray*, 98 Ind. 358; *Railway Co. v. Smith*, 121 Ind. 353, 22 N. E. 775. The decision in *Railroad Co. v. McDaniel*, 12 Lea, 386, is not antagonistic to that here made, for, while there was some reason for extra help and expeditious labor in that case, McDaniel, the person injured and suing for damages, was not requested by the conductor or any other authorized person to render service as in an emergency, but only by the company's stock agent, who like McDaniel was a passenger on a train near by. Let the judgment be affirmed.

NOTE.

Authority of Conductor to Employ Hands in Case of Emergency.—When the regular brakeman is absent, and the proper and safe management of the train requires, the conductor has authority to supply the place of the absent brakeman, and for the time being such person is an employee of the railroad, and entitled to recover for an injury caused by the negligence of a co-employee. *Sloan v. Central Iowa Ry. Co.*, 11 Am. & Eng. R. Cas. 145 *et seq.*

In case of emergency, the conductor has implied authority to engage a person to act as brakeman in place of one disabled by sickness. *Georgia Pacific R. Co. v. Propst (Ala.)*, 38 Am. & Eng. R. Cas. 11.

WEST

v.

SOUTHERN PAC. CO.

(*Circuit Court of Appeals, Eighth Circuit, Feb. 7, 1898.*)

Injury to Brakeman—Uncovered Culverts—Assumption of Risk.*—Where a railroad company has constructed its culverts without coverings, a brakeman who subsequently enters its service cannot complain on account of the manner of their construction if he continues to remain in its service after becoming aware of the fact; unless the culvert into which he falls is in the vicinity of a point where he may be expected to alight from the train while performing a duty pertaining to his employment; and a culvert 281 feet from such point is not within its vicinity within the meaning of the rule.

*See note at end of case.

ERROR by plaintiff to the Circuit Court of the United States for the District of Utah. *Affirmed.*

This is an action for personal injuries, and arises out of the following state of facts : In August, 1893, the plaintiff was a brakeman on one of defendant's freight trains running between Carlin, in the state of Nevada, and Terrace in the state of Utah. The train was going east. At the station known as Moline there was a side track, with switches at the west and east ends. The rules of the company, which were printed, and with which the plaintiff was familiar, required that, in approaching such switch from the west, this freight train should pass onto the side track through the west switch, so as to give the right of way to a west-bound passenger train due at Moline within a few minutes after the arrival of the freight train. This requirement was essential to prevent a collision in the event of the freight train undertaking to accomplish the side-tracking by first passing through the eastern switch, and then backing onto the side track. The plaintiff's testimony showed that, while he was aware of this rule, the trainmen had for some time been in the habit of effecting the entry by passing through the eastern switch, and then backing onto the side track. On the occasion in question it reached the side track in the manner just stated. The plaintiff, as the rear switchman, was in the habit of passing from the rear step of the caboose, after the train cleared this switch, in order to throw the switch for the train to back in onto the side track. On this occasion he did not leave the step of the caboose just as the train passed the switch, but, as the train ran unusually far beyond the switch, he did not step off until he reached a point 281 feet east of the switch. It was then about 11 o'clock p. m., and the night was somewhat dark. He had his signal lantern in his hand, which, in descending from the car, would cast its light on the ground, although the plaintiff claims that he exercised circumspection before stepping off. At this point there was a culvert, about four feet deep and about the same width, with lateral fo

walls of stone, placed there by the company to carry off the water which might accumulate against the embankment constructed at this point. This culvert was uncovered, and in alighting from the caboose the plaintiff stepped into the culvert, and received an injury to his kneecap and further bruises.

The negligence imputed to the railroad company, as the basis of recovery, is charged in the petition as follows: "That it was the duty of defendant to provide and maintain suitable covers or guards for all of its culverts under its roadbed which might be in the vicinity of any side track or switch on its road; but that, in violation of its said duty, the defendant constructed and maintained an open or uncovered culvert near the end of the side track at Moline, at a point where it became necessary for the plaintiff to step off from the said freight train in order to turn the switch and permit the freight train to go upon the said side track, as so ordered by the defendant; and in so doing, and in ordering the plaintiff to perform such duty where such uncovered culvert was situated, the defendant conducted itself carelessly, negligently, and unskillfully, whereby," etc.

The evidence showed, without contradiction, that on this road, between the points over which the plaintiff ran as brakeman, and over which he made trips every two or three days for three years past, there were 292 culverts, none of which was covered. It is true the plaintiff testified that he had seen one covered culvert, but when and where he could not state. It was the custom of the company to so construct its culverts, and such method was deemed by its engineers and track builders to be proper and safe. At the time of this injury the plaintiff had been in the employ of the defendant as brakeman on this line of road for three years. He knew the culverts were uncovered, although the evidence does not show that, prior to this accident, he knew of the exact locality of this particular culvert. On this evidence the court directed a verdict for the

defendant. To reverse this judgment the plaintiff prosecutes a writ of error.

James H. McMillan (*Charles C. Richards* and *Arthur E. Pratt*, on the brief) for plaintiff in error.

Thomas T. Fauntleroy (*Marshall F. McDonald* and *John T. Cochran*, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

The plaintiff cannot be heard to complain of any supposed neglect of the company in constructing its culverts without coverings. When he accepted service as a brakeman on this road, he knew of this condition of the culverts. For three years he continued in such service, with full knowledge of the fact, without objection. In this respect the rule "*volenti non fit injuria*" applies. The servant is free to accept or refuse employment on a roadway of a particular construction. If he accepts such employment, and continues therein, as in this case, with full knowledge of the structures, without objection, the language of the court in *Lovejoy v. Railroad Corp.*, 125 Mass. 79, is quite applicable :

"The abutments of 46 bridges, numerous buildings, entrances to stations, and other structures on the line of the defendant's road, were the same distance from the track. These facts were known to the plaintiff, though he testified that he had not, previously to his alleged injury, noticed this particular post. The only negligence imputed to the defendant was in placing this post so near the track. As between the plaintiff and the defendant, it was immaterial whether it would have been more prudent to have placed the signal posts, abutments of bridges, and other structures, so numerous on the line of the defendant's road, more than 3 feet 8 inches from the track. If there was any danger to the plaintiff, while in the performance of his duty, from the structures thus placed, it was a risk that he

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had assumed. He knew the manner in which the road was constructed, the proximity of the track to these structures, and the method employed in the management of the trains. The defendant had the right to construct its road and conduct its business in this manner, and, as was said in *Ladd v. Railroad*, 119 Mass. 412, is not liable to one of its servants, who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom."

The real question for decision is, was it actionable negligence for the railroad company to leave the culvert uncovered at the point of this accident? The law imposes upon the master the duty of exercising reasonable care to provide his employee a reasonably safe place at which he is required to work. At and about a switch, where a brakeman may be expected to alight from the train for the purpose of turning the switch, the company may be held liable for an injury to the brakeman occasioned by the proximity of a pitfall like an uncovered culvert, the presence of which is unknown to the employee at the time, or where the dangerous pitfall or hole, although exposed to view, so that the workman if thoughtful and observant, might see and avoid it, yet, by reason of his intentness upon the immediate work in which he is engaged, his attention for the moment is diverted.

The cases principally relied on by counsel for plaintiff (*Millen v. Railroad Co.* [Sup.] 46 N. Y. Supp. 748; *Slauson v. Railway Co.*, 60 N. Y. 608; *Railway Co. v. Teeter*, 27 U. S. App. 316, 11 C. C. A. 332, and 63 Fed. 527; *Franklin v. Railway Co.* [Minn.] 34 N. W. 898) presented a state of facts from which it appeared that the immediate vicinity of the place where the servant was called upon by the employer to perform his work was so near to some hidden hole or opening or obstacle as to expose the servant to the danger of stepping into the one or coming against the other, or presented the instance, just above alluded to, where the dangerous opening or obstacle was not observed by the

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employee on account of his attention for the instant being diverted to the execution of the work in which he was engaged. But such is not the case presented by this record. The culvert in question was 281 feet from the switch. It was not, within the meaning of the rule, in the vicinity of the point where the defendant company had assigned the plaintiff to work. By express rule, known to the plaintiff, the defendant had enjoined upon the trainmen, that, in reaching the side track at Moline from the west, they should pass onto the side track by throwing the switch at the west end of the switch limits. The switch where the defendant had by its rule assigned this plaintiff to work was at the west, where no such accident would have befallen him. He knew, from the rule of the company, that the eastern switch was not designed nor intended to be used by the company in backing east-bound trains through it onto the side track. He knew that the trainmen, in thus reaching the siding, were acting in violation of the explicit published rule of the company. And while he is not to be held responsible for the misconduct in this respect of the conductor or engineer, he never protested against this infraction of the rule, nor advised his employer thereof. For the use designed by the company of the eastern switch, no probable responsible hazard on the part of the defendant could be incurred by this brakeman on account of the uncovered culvert 281 feet east of the switch. This is so, for the obvious reason that the duty of turning the switch for the admission of a west-bound train to the side track would devolve on the brakeman nearest the front of the train, when, presumptively, the engine having halted near the switch, the brakeman would dismount from the train at a point far within the bounds of 281 feet.

If a liability is to attach to the company because of the unusual and not to be reasonably anticipated incident of this brakeman undertaking to step off the train 281 feet from the switch which he was to operate, simply because the train did not stop nearer the switch, where is the line of accountability on the part of the

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company to be drawn? There would be just as much reason and justice in authorizing a recovery, had the train gone 1,000 feet further to the east than was necessary, and the defendant had undertaken to step therefrom and fallen into a culvert. Where, as in this case, the uncovered pitfall was so far beyond the place where the injured party was assigned by his master to work as to admit of no divided opinion among reasonable men as to its being beyond the reasonable vicinity of the place for the performance of the required work, the question of fact passes out of the exclusive domain of a jury and becomes solely a question of law for the determination of the court. The judgment of the circuit court is therefore affirmed.

NOTE.

Defective Structure—Assumption of Risk by Employees.—It is the duty of a company to cover its bridges and culverts within its yards and within a reasonable distance of its switches, wherever in the performance of their duties, it would naturally be anticipated that brakemen would be apt to go for the purpose of making couplings. *Franklin v. Winona & St. P. R. Co.*, 31 Am. & Eng. R. Cas. 211.

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v.

BARRY.

(Circuit Court of Appeals, Eighth Circuit, Jan. 31, 1898.)

Injury to Employee—Collisions—Running Trains—Sufficiency of Rules.—In an action against a railroad company by its engineer for injuries sustained in a collision between the extra train upon which plaintiff was employed and a regular freight train, which was stationary at the time of the accident, such collision having resulted from gross negligence on the part of defendant's employees in charge of such trains, it was error to charge, in effect, that defendant was negligent because its road was operated under the standard rules, which require, without special notice, those in charge of trains to

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look out for and to protect themselves from other trains; the evidence in the case as to the sufficiency of such rules being conflicting.

Same—Standard Rules.—In such action the jury should have been instructed that such standard rules were neither unreasonable nor insufficient.

Same—Sufficiency of Rules a Question of Law.*—Where a railroad company has deliberately adopted a system of rules, which have been made familiar to its employees, and its road is operated under them, the reasonableness and sufficiency of such rules are questions of law for the determination of the court.

Same—Proximate Cause.—A railroad company is not liable for the injuries of an employee sustained in a collision where the proximate cause of the collision is gross negligence on the part of its servants, even though it had failed to give sufficient notice of the position and movements of the trains, if the collision could not have been foreseen or reasonably anticipated as the probable result of its failure to give such notice.

ERROR by defendant to the Circuit Court of the United States for the Eastern District of Arkansas.
Reversed and remanded.

G. B. Rose (U. M. Rose and W. E. Hemingway, on the brief), for plaintiff in error.

J. M. Moore and W. L. Terry, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. About 2 o'clock in the afternoon on October 26, 1890, engine No. 5 of the Little Rock & Memphis Railroad Company ran into

Case Stated. the rear of a freight train on the railroad of that company; and G. F. Barry, the defendant in error, who was the fireman on this engine, leaped from it, and was injured. He sued the company for damages, and alleged that he was injured by its negligence in employing an incompetent conductor upon the train his engine drew, and in failing to give notice to its servants in charge of engine No. 5 of the whereabouts and movements of the freight train, and in failing to give notice to its servants in charge of the freight train of the whereabouts and movements of engine No.

*See note at end of case.

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5. The plaintiff in error, the railroad company, answered that its conductor was not incompetent, and that it was not its duty to give the conductor and engineer of either of the trains which collided notice of the movements or whereabouts of the other. Upon these two issues the testimony was conflicting, and the jury found for the defendant in error. These facts, however, were uncontradicted: The railroad of the plaintiff in error extends from Hopefield, a town opposite Memphis, in the state of Tennessee, westward to Little Rock, in the state of Arkansas. The first telegraph station west of Hopefield is Edmondson, 15 miles distant, and the second is Forrest City, 47 miles distant. Argenta is a station still further west, near the city of Little Rock. The freight train was a regular train. It had left Hopefield at 3:50 a. m., was due at Edmondson at 5 a. m., but had been so delayed that it did not leave that station until 9:40 a. m., 4 hours and 40 minutes later than its schedule time; and while it was standing on the main track, on a curve in a deep cut outside the yard limits, about half a mile east of Forrest City, at about 2 o'clock in the afternoon, engine No. 5 crashed into the rear of it. The engineer in charge of this engine had passed this freight train at Edmondson at 9:30 that morning, on his way east to Hopefield, and he knew it was late. When the superintendent of the company delivered the order, under which the train drawn by engine No. 5 was operated on this day, to its conductor, he told him to look out for this freight train, as it was still in the bottom between Edmondson and Forrest City; and the conductor repeated this warning to the engineer when he communicated the order to him before leaving Hopefield. In the early part of this day a military company, which arrived at Memphis too late for the regular passenger train, engaged of this railroad company an extra train to take it to Little Rock, and the engineer and fireman of engine No. 5 were directed to draw this train with their engine. The freight train was, as we have said, a regular train, and it was known

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as "No. 5." This was the order under which the extra ran:

Little Rock & Memphis Railroad.
Telegraphic Train Order No. 5

31
Memphis, Oct. 26, 1890.

To C. & E. of Eng. 5, Hopefield
C. & E. No. 5 at Forrest City
C. & E. Eng. 4 & No. 6 Brinkley
Engine 5 will run from
Hopefield to Argenta extra
when No. 5 is overtaken pass
and run ahead of them
meet No. 6 and Eng. 4 at
Brinkley, do not pass Brinkley
Unless Eng. 3 is there.

A. J. W.

The rules of the company made this extra train inferior in grade to the regular freight train, under this order, and imposed upon its conductor and engineer the duty to keep out of the way of that freight train, which they knew was somewhere upon the single track in front of them. These rules also required the crew of the freight train, when it stopped and stood, as it did, for three-quarters of an hour before the accident occurred, on the curve, in a deep cut, one-half mile east of Forrest City, to immediately station and maintain a flagman 10 or 12 telegraph poles in the rear of its train, and to place torpedoes on the track, not less than 15 telegraph poles behind it, for the purpose of warning and stopping approaching trains which might follow it. These rules gave the employees of the company notice that it proposed to use its railroad for the passage of trains at any time it chose, and that they must protect themselves against their approach. The engineer of the extra train, however, did not keep his engine under control, so that he could stop it when he saw the freight train, but he drove it on with such speed that it was impossible for him to prevent the collision after he came in sight of the regular train; and the crew of the freight train failed to give warning to the approaching extra of the presence of their train, either by torpedo or by flagman. In short, these fellow servants of the defendant in error were guilty of gross negligence, without

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which it is highly improbable, if not impossible, that the accident could have occurred.

One of the rules of the company, however, required all orders to be given in writing, where practicable; and counsel for the defendant in error insisted that the company was negligent because it did not insert in the written order to the men in control of the extra train a statement that the freight train was delayed east of Forrest City, and an admonition to beware of it, and because the train dispatcher did not stop the extra train at Edmondson, as it passed there, and notify its crew again that the freight train had not reached Forrest City. In support of their view, three witnesses for the defendant in error, who had had experience in railroading, testified that in their opinion this course should have been pursued. On the other hand, it appeared by the evidence that this railroad was operated under the standard rules, which were prepared some years ago by experienced railroad men chosen for the purpose by the officers of various railroad companies, and that they had been subsequently so generally adopted, as the best in use, that, in 1888, 58,000 (and at the time of the trial many more) miles of railroad were governed and operated under them. Three witnesses of skill and experience in the operation of railroads, who were familiar with these rules, and the practice of railroads under them, testified in effect, that in their judgment, and in the judgment of those who had prepared and adopted them, they were the best and the most conducive to safety of any rules in use in this country; that it is more conducive to the safety of the operation of railroads to require the men in charge of a train to look out for, and protect themselves at all times against, other trains and engines, without notice of their whereabouts and movements, than it is to undertake to give them notice of these movements and whereabouts, and this for the reason that if men receive, and come to expect, notice of approaching trains, they will invariably relax their vigilance, and rely upon the notice, rather than upon their watchfulness, for their safety,

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and that in the long run they will be caught in danger more frequently, and more accidents will happen at times when it is impossible or impracticable to convey notice to them, than would occur if they were spurred to constant watchfulness by the knowledge that a train was liable to come upon them at any time without notice. These witnesses testified, in substance, that this was the theory upon which the standard rules were based, and that they did not require the superintendent or train dispatcher to give the men in charge of either of these trains notice of the whereabouts or movements of the other. They also testified that in their opinion neither the duty of the company, nor the safety of its servants, required that the crew of either train should have notice of the movements or whereabouts of the other, or that the extra train should be stopped at Edmondson, and its conductor or engineer informed that the freight was still between that station and Forrest City, where they knew it to be when they started. In this state of the evidence, it is assigned as error that the court charged the jury :

“In sending out special or extra trains, due and sufficient notice of the movements and whereabouts of all other trains and locomotives which are liable to be met or overtaken by the special or extra should be given to the officers or servants in charge of such trains. And due notice of such special or extra train should, in like manner, be given to the servants in charge of such other trains, as far as may be necessary to guard against and prevent accident. And if, from any cause, it is impracticable to give such notice, then such other precautions as are reasonably adapted to prevent danger of collision or accident should be taken. If the jury believe from the evidence that the defendant, through any default or neglect on its part, failed to perform the aforesaid duties, and that the collision was caused by such failure, and that thereby plaintiff sustained the injuries complained of, the defendant is liable in this action.”

**Injury to Em-
ployee—Collisions
—Running Trains
—Sufficiency of
Rules.**

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This instruction is a plain declaration that the theory which the wisdom and experience of many of the most careful and intelligent railroad operators have deemed most conducive to the safety of their employees, their passengers, and their property, is unsound, that the rules based upon it are unreasonable, and that the operation of a railroad in accordance with it is negligence. Such a declaration of the law ought not to be made without clear and convincing proof, nor without the most careful and deliberate consideration. The theory upon which these rules are based, the rules themselves, and the operation of railroads in accordance with them, have all received the sanction of respectable authority. *Railroad Co. v. Neer*, 26 Ill. App. 356, 360; *Id.*, 31 Ill. App. 126, 134, 139; *Kennelty v. Railroad Co.* (Pa. Sup.) 30 Atl. 1014; *McGrath v. Railroad Co.*, 15 R. I. 95, 97, 22 Atl. 927; *Wright v. Railroad Co.*, 25 N. Y. 562, 569. It does not seem unreasonable to suppose that men who are warned that other trains will pass over the railroad on which they are operating without notice to them, and that they must watch for and protect themselves against them at all times, would operate their trains with more care and fewer accidents than they would if an attempt were made to notify them of the whereabouts and movements of all trains, in view of the fact that the expectation of such notice might relax their vigilance, and that they would often be in locations where it would be impossible to give them the notices. If experience has proved this supposition to be in accordance with the fact, and has led to the adoption of rules which do not require, but discountenance, such notices, because the habit of giving them has been found to increase the number and danger of accidents, as the adoption of these standard rules by so many railroad companies, and the testimony of the experienced witnesses who are operating railroads under them, tend to show, it cannot be said that it was the duty of the defendant to give these notices, nor that its failure to give them was negligence. The fact is

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not forgotten that the defendant in error produced three witnesses who testified that such notices should have been given. But in our opinion their testimony is insufficient, in the face of the evidence of three witnesses of equal credibility who testified to the contrary to so clearly establish the vice of the theory, and the unreasonableness of the rules and practice which companies operating more than 58,000 miles of railroad have adopted as the best and most conducive to safety, as to warrant a court in so declaring as a matter of law. The skilled and experienced railroad operators who seem to have developed this theory and formulated these rules are undoubtedly more competent than jurors or judges to select and prepare rules most conducive to the safe, economical, and prosperous operation of railroads.

The interest of the owners of these railroads, the interest and ambition of those who operate them, alike prompt them to select and use the best; and unless the rules they adopt are clearly shown to be palpably unreasonable or clearly insufficient, railroad companies ought not to be charged with negligence on account of their adoption and use. *Vedder v. Fellows*, 20 N. Y. 126, 133; *Enwright v. Railway Co.* (Mich.) 53 N. W. 536.

Name—Standard
Rules.

In our opinion, there was no such proof in this case; and at the close of the trial the court should have instructed the jury that the system of rules, and practice under them, which the company had adopted, was neither unreasonable nor insufficient. The defendant in error and the other servants of the company were familiar with these rules, and the theory upon which they were based. By taking service under them without objection or protest, they assumed the risks and dangers of the theory that every employee who operates trains must beware of other trains moving in the same direction, without notice of their whereabouts, and the risks and dangers of the system of rules which was based upon this theory. *Wolsey v. Railroad Co.*, 33 Ohio St. 227. When a railroad company has deliberately adopted a system of

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rules, which have been made familiar to its employees, and its railroad is operated under them, the reasonableness and sufficiency of these rules are questions of law, and not of fact. These questions must be determined by the court, because there is no other way in which a set of rules may ever be established or adjudicated as either reasonable or sufficient. It may be said that trial judges often differ upon questions of this character. But the answer to this objection is that the appellate court will finally settle them, and in the end a substantial uniformity of decision as to the reasonableness and sufficiency of any set of rules in general use must eventually result if these questions are left to the determination of the courts. If on the other hand, they are remitted to the juries, their various findings can result in little less than confusion worse confounded. The decision of an appellate court becomes a precedent for the rulings of many inferior courts. But the finding of one jury is no precedent for the decision of another, and a rule that is found to be reasonable by one jury will frequently be thought to be unreasonable by another; and no criterion will ever be established by which railroad companies may measure their duties in this regard, if the reasonableness and sufficiency of their rules are to be daily submitted to new tribunals, which are governed by no precedent, and are without experience in the determination of these questions. We adhere to the view of this question expressed by JUDGE CALDWELL in the opinion of this court in *Railway Co. v. Dye*, 36 U. S. App. 23, 28, 16 C. C. A. 604, 607, and 70 Fed. 24, 27, which is supported by the following authorities, among others: *Vedder v. Fellows*, 20 N. Y. 126, 130; *Railway v. Adcock*, 52 Ark. 406, 410, 12 S. W. 874; *Railway Co. v. Hammond*, 58 Ark. 324, 334, 24 S. W. 723; *Railroad Co. v. Whittemore*, 43 Ill. 420, 423; *Railroad Co. v. Fleming*, 18 Am. & Eng. Ry. Cas. 347, 352; *Tracy v. Railroad Co.*, 9 Bosw. 396, 398, 402; *Hoffbauer v. Railroad Co.*, 52 Iowa, 342, 343, 3 N. W. 121.

Same—Sufficiency
of Rules a Question
of Law.

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Moreover, the court, in effect, told the jury by this instruction that, if they believed that the collision occurred through the failure or neglect of the railroad company to give these notices, the defendant in error might recover. It is difficult to understand what basis there is in this case, under the admitted facts, for a finding that a failure to give these notices caused this collision. If we concede that the failure to write the notice which was verbally given to the conductor and engineer of the extra train at Hopefield, that they must look out for the freight train which was in the bottom between Edmondson and Forrest City (an unreasonable concession, except for the sake of argument), and the failure to stop the extra train at Edmondson, and notify its conductor and engineer that the freight train was still there, and the failure to send a courier from Forrest City, or some other point, to the freight train, to notify its conductor and engineer that the extra train was coming, constituted negligence, there still remains what seems to us an insuperable obstacle to a recovery on this ground. An injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable. An injury that is not the natural consequence of an act of omission, and that would not have resulted but for the interposition of a new and independent cause, is not actionable. *Railway Co. v. Elliott*, 12 U. S. App. 381, 386, 5 C. C. A. 347, 350, and 55 Fed. 949, 952; *Finalyson v. Milling Co.*, 32 U. S. App. 143, 151, 14 C. C. A. 492, 496, and 67 Fed. 507, 512; *Railway Co. v. Bennett's Adm'x*, 32 U. S. App. 621, 16 C. C. A. 300, and 69 Fed. 525; *Railway Co. v. Callaghan*, 12 U. S. App. 541, 550, 6 C. C. A. 205, 210, and 56 Fed. 988, 993; *Railway Co. v. Moseley*, 12 U. S. App. 601, 609, 6 C. C. A. 641, 646, and 57 Fed. 921, 926; *Insurance Co. v. Melick*, 27 U. S. App. 547, 557, 12 C. C. A. 544, 550, and 65 Fed. 178, 184. It was the duty of the engineer and conductor of the extra train to look out for and to so operate their train that their engine would not crash into the freight which

Name—Proximate Cause.

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they knew was on the track before them. It was the duty of the engineer of that train, who alone could see the track in front of him, to so govern the speed of his engine that he could at any time stop it within the range of his vision. It was the duty of the crew of the freight train to place torpedoes on the track at least 15 telegraph poles in the rear of their train when it stopped at the place of the collision, and to station a flagman 10 or 12 telegraph poles behind that train. The railroad company had the right to presume that its servants on these trains would obey its rules and discharge these duties, and it had the right to act upon that assumption. It was its right to calculate the natural and probable result of its acts and omissions upon this supposition. Indeed, it could reckon upon no other, for it is alike impracticable and impossible to predicate and administer the rights and remedies of men on the theory that their associates and servants will either disregard their duties or violate the laws. Now, no one who reckoned on the faithful discharge of their duties by these employees could reasonably have anticipated this fatal collision as either a natural or probable consequence of the failure to give these notices. Nor could it have been the result of such failure, had not the unforeseen negligence of the engineer of the extra train, and the gross and unexpected carelessness of the crew of the freight train, intervened to interrupt the natural sequence of events, to turn aside their course, and to prevent the safe operation of these trains, which was the natural and probable result of the rules and the orders which the defendant gave. It was the gross negligence of these servants, which no one could anticipate, that constituted the intervening and proximate cause, without which this collision could never have been; and it is to this, and not to the failure to give the notices, in our opinion, that this accident must be attributed, under the maxim, "*Causa proxima, non remota, spectatur.*"

There are many other errors assigned in this case, and many other questions discussed in the briefs of counsel, but the case must be retried on account of

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those to which we have referred. What has already been said will be a sufficient intimation of our views to guide the court in the coming trial, and it would be unprofitable to extend this opinion by the discussion of other questions which may not again arise. The judgment below must be reversed, and the cause remanded to the court below, with directions to grant a new trial; and it is so ordered.

THAYER, Circuit Judge. I concur in the view that the case should be reversed for error in the instruction which is quoted above, in the opinion of the majority of the court. There was a controversy before the jury as to whether the engineer and conductor of the extra train ought to have been notified at Edmondson that freight train No. 5 had not arrived at Forrest City, and that they must keep a sharp lookout for the freight train between the two stations last mentioned. Three expert railroad men, who were called as witnesses for the plaintiff below, testified, in substance, that such notice ought to have been given; that as the engineer of the extra train would naturally infer that the freight train had reached Forrest City by the time the extra train reached Edmondson, since the freight train was then over due at the former station, he ought to have been notified by the train dispatcher at Edmondson that such was not the fact, and that for some unknown reason the freight train had been delayed, and was not where it would very naturally be expected to be. In other words, three railroad men expressed the opinion, in substance, that, as applied to the facts existing when the extra reached Edmondson, the standard rules were not adequate to afford protection to trainmen and passengers, but that some further precautions ought to have been taken by the train dispatcher. Several witnesses for the defendant company expressed a contrary opinion, namely, that the standard rules were sufficient to meet any and every emergency, and that no additional notice ought to have been given at Edmondson. This was one of the crucial issues in the case, to which the attention of the jury should have been more specifically directed.

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The instruction above quoted, which was given by the court, was couched in very general language, and was liable to be understood by the jury as meaning that it was the duty of the train dispatcher, in any event, and without reference to the existence of the rules, to have given notice at Edmondson that the freight train had not arrived at Forrest City. Being too general, as applied to the issue of fact above stated, and for that reason being liable to mislead, I agree that the case should be reversed, and a new trial ordered.

Other views, however, are expressed in the opinion of the majority of the court, to which I cannot assent. It is held broadly, as I understand, that when a railroad company adopts rules for the operation of its trains, or for the management of its business, and puts them in force, the question as to the reasonableness and sufficiency of such rules to afford protection to its employees and to the traveling public is always a question of law to be decided by the court. In my judgment, this proposition is not tenable, either upon principle or authority. When a controversy arises in a court of justice touching the reasonableness or sufficiency of a code of rules that has been adopted by a corporation or individual for the management of their business, and competent witnesses express different opinions upon that subject, an issue of fact is presented, which can only be determined by a jury, unless a trial by jury is waived. Judges cannot arrogate to themselves the power of determining such questions, on the ground that such practice insures greater unanimity of opinion, or on any other ground, without denying suitors their constitutional right of trial by jury. The cases cited by the majority of the court in support of the proposition that the question whether a given code of rules is reasonable and sufficient is one of law (with one exception, to wit, *Railway Co. v. Whittemore*, 43 Ill. 420, 423) were all cases where a rule or regulation was introduced without any testimony tending to show whether the regulation was reasonable or otherwise,

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and the decisions were simply to the effect that in such cases the court could properly decide as to reasonableness of the regulation. In three of the cases, and particularly in the case of *Vedder v. Fellows*, 20 N. Y. 126, 131, to which all the other cases refer as the foundation of the doctrine, it was clearly intimated that the reasonableness of a regulation is a question of fact for the jury when there is a conflict of testimony upon that issue, and it is difficult to conceive how the rule could be otherwise without ignoring fundamental principles. In the case of *Railway Co. v. Adcock*, 52 Ark. 406, 410, 12 S. W. 874, the court said, "The facts being uncontroverted, it was the province of the court to declare the regulations reasonable." The same remark was quoted with approval in the subsequent case of *Railroad Co. v. Hammond*, 58 Ark. 324, 334, 24 S. W. 723; and in a late case in New York (*Abel v. Canal Co.*, 128 N. Y. 662, 666, 667, 28 N. E. 663), where the sufficiency of a code of rules which had been adopted by a railway company was challenged, and there was some testimony on that subject besides the rules themselves, it was held that the issue presented was properly submitted to the jury. I conclude therefore, that the reasonableness of a regulation is a question of law for the court only in those cases where no testimony is offered tending to show whether it is reasonable or otherwise, and that where, as in the case at bar, there is a conflict of testimony on such issue, the question is one of fact for the jury.

In the opinion in chief it is further held that the defendant company is not liable to the plaintiff, even if it was guilty of negligence in failing to inform those in charge of the extra train at Edmondson of the then whereabouts of the freight train. This conclusion is based on the ground that the negligence of the defendant company was not the proximate cause of the accident, but that the accident was solely occasioned by the fault of certain fellow servants of the plaintiff. I am not able to assent to this proposition. If, as the testimony for the plaintiff below tended to show, the

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rules were insufficient for the protection of trainmen and passengers, as applied to the conditions existing when the extra train reached Edmondson, and if at that station the train dispatcher ought to have given the information last above specified to the engineer and conductor of the extra train, then, in my judgment, it was the right of the jury to determine whether such omission of duty on the part of the defendant company directly contributed to the accident. The question as to what was the proximate cause of an injury is ordinarily not one of legal knowledge, but of fact, for the jury to determine, in view of all the accompanying circumstances. *Railway Co. v. Kellogg*, 94 U. S. 469, 474. And in the case at bar the jury might well have reached the conclusion that a word of caution spoken at Edmondson to the engineer in charge of the extra train would have prevented the disaster. The operator at Edmondson evidently thought that the extra train ought to be warned that the freight train had not reached Forrest City, for as it came into view he said to the train dispatcher, over the wire: "Here comes the special. Have you any orders for it?" The engineer of the extra train well knew that sufficient time had elapsed to enable the freight train to reach Forrest City, and he doubtless supposed that it had passed that station some time before the extra reached Edmondson. If he had been warned that it had not reached Forrest City, he would doubtless have exercised a degree of care commensurate with the conditions which actually existed, and the jury might reasonably have found that the failure to give such warning directly contributed to the injury. Moreover, the fact that certain fellow servants of the plaintiff were also guilty of negligence did not absolve the defendant company from liability for its own neglect of duty, or that of its train dispatcher, since it is well settled that it is no excuse for a master, when sued by his servant, that the negligence of a fellow employee, as well as his own, contributed to occasion the injury. For these reasons I cannot concur in the views of my associates,

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that they have the right to determine that the negligence of the defendant company was not the proximate cause of the accident.

NOTE.

Sufficiency of Rules a Question of Fact.—Whether or not rules promulgated are reasonably sufficient to insure the safety of servants if observed, and whether or not a reasonably sufficient supervision was exercised to enforce the observance of the rules, are questions of fact, which must be determined by the jury from the evidence. *Van Tassel v. New York, L. E. & W. R. Co.*, 1 Misc. 299, 48 N. Y. S. R. 767, 20 N. Y. Supp. 708, reargument denied in 2 Misc. 592; *Memphis & C. R. Co. v. Graham*, 53 Am. & Eng. R. Cas., 396, 94 Ala. 545.

TUMALTY

v.

NEW YORK, N. H. & H. R. Co.

(*Supreme Judicial Court of Massachusetts, Jan. 8, 1898.*)

Death of Employee on Track—Due Care by Deceased—Burden of Proof.*—In an action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the gross negligence of defendant, a railroad company, the evidence showed that while deceased was engaged at night in making changes in a switch at an extremely dangerous point on defendant's road, he was struck and killed by defendant's trains, and also showed that he was taking no precautions to avoid such an accident though he was aware of the probability of the passage of a train by that point at about that time. *Held*, that the burden of proof was on the plaintiff to show that deceased was exercising due diligence at the time of the accident, and that he had failed to sustain such burden.

Same.—Plaintiff having failed to sustain such burden, the question whether or not defendant's servants in charge of the train were guilty of gross negligence was immaterial.

APPEAL by plaintiff from Suffolk county superior court. *Affirmed.*

E. O. Shepard, for appellant.

Benson & Choate, for appellee.

LATHROP, J. The plaintiff's intestate, at the time of the accident, and for four or five weeks

*See *Parish v. Western & A. R. Co.* (Ga., 1897), 10 Am. & Eng. R. Cas., N. S., 574, and *note*, 583 *et seq.*

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before, was in the employ of the Union Switch & Signal Company, of Pittsburg, Pa., and with his fellow workmen was engaged in making changes in the switches and the apparatus connecting them with a signal tower. This tower was on the main line of the Providence Division of the defendant's road. The switch at which they were working at the time of the accident was in a track leading from the main lines to a round house, a coal dump, and ash dumps all of which were in a yard. Trains of cars were constantly passing on the main tracks, and locomotive engines and cars were frequently passing the place of the accident. Just before the accident, the plaintiff's intestate had been sent to the signal tower for some Carter pins. When he returned, Hart, who had charge of the gang, was on his hands and knees, trying to put a pin in the track. It was then so dark that he had to feel where to put the pin. Some minutes before the accident, the men had a torch, but it had gone out, because there was no oil in it. When the men had previously worked after dark, they had lamps with kerosene burners, that gave considerable light. Hart was kneeling outside of the rails, facing towards the track. One Kilgariff stood about two feet off, towards Boston. The plaintiff's intestate, on returning from the tower, spoke to Hart, and then started to walk down the track between the rails away from the engine. At this moment a switching engine backed down, with no light on the tender, and the bell was not ringing. The plaintiff's intestate was struck and killed. The place where the accident happened was one of great danger even in the daytime, and the evidence is that the men were fully aware of this fact, and looked out for themselves. While it is true that the rules of the defendant required yard engines to carry two green lights, "except when provided with headlight both front and rear," yet there is no evidence that the intestate knew of the rule. The evidence shows that the engine which caused the injury did not at any time carry green lights, although it had no light

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on the the tender. The intestate could not therefore rely upon the warning which a light might give.

The plaintiff relies upon the evidence of Hart, who testified that, the last time the engine passed before the accident, he called out to the engineer, and told him to look out for them when he came back; and the plaintiff contends that the men at work had a right to rely upon the engineer's warning them when he again approached. But Hart also testified that he did not know that the engineer heard him. It also appears that, when the engine passed before the accident, it was just at dusk, and that when it returned it was very dark, and the men were at work, without anything in the way of a light to indicate where they were. The evidence shows that the plaintiff's intestate and his fellow workmen were taking no precautions whatever to guard against being run over, although an engine might be there at any moment. We are therefore of opinion that the plaintiff has failed to sustain the burden of proof which rested upon him of showing that his intestate was in the exercise of due diligence. *Lynch v. Railroad Co.*, 159 Mass. 536, 34 N. E. 1072; *Sullivan v. Railroad Co.*, 161 Mass. 125, 36 N. E. 751; *Galvin v. Railroad Co.*, 162 Mass. 533, 39 N. E. 186. It is unnecessary therefore to consider whether there was sufficient evidence to warrant the jury in finding that there was gross negligence or carelessness on the part of the defendant's servants or agents. Exceptions overruled.

Death of Employee
on Track—Due
Care by Decedent—
Burden of Proof.

SCHIMPF

v.

HARRIS *et al.*

(*Supreme Court of Pennsylvania, March 21, 1898.*)

Injury to Passenger—Negligence of Brakeman While off Duty—Liability of Master.—In an action against railroad receivers by a passenger for injuries sustained through the act of defendant's brakeman in negligently pushing her from the car, it appeared from

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the evidence that the brakeman was off duty, but that under the circumstances it was his duty as an employee to go out of the car and inform some one in authority that passengers were leaving it before their tickets were collected; that at the time he passed the plaintiff, and, it was alleged, pushed her from the car, he had not announced his intention to collect the tickets himself, but that he then proceeded to do so. *Held*, that if the act complained of was done while he was on his way to give such notice, it was an act done while he was in the line of his duty; and if it was done after he had decided to collect the tickets, and while on his way to do so, it was for the jury to say whether it was done while he was acting in the line of his duty.

APPEAL by defendant from court of common pleas, Philadelphia county. *Affirmed*.

Gavin W. Hart, for appellants.

George P. Rich and *Henry C. Boyer*, for appellee.

FELL, J. The plaintiff took a train at the Philadelphia & Reading terminal station to go to Girard avenue station. Because of a strike of the employees of the city passenger railway companies, the travel on the defendant's road had been greatly increased, and the conductor and brakeman in charge of the train had not been able to collect all the tickets when it reached Girard avenue. As the train stopped at the station, some one of the party with whom the plaintiff was riding called out: "Our tickets have not been taken up." This remark was repeated by others of the party, and was heard by a number of employees of the road, conductors and brakemen, who were in the car going home, and not on duty. One of these employees, a conductor, said to a brakeman: "You had better get out there, and see to them, and see that their tickets are gathered." The brakeman arose from his seat, and, either at that time or as he crossed the platform of the car, said: "I will take your tickets." He walked hurriedly out of the car, across the platform, to the front platform of the next car, and down its steps to the floor of the station, and received the tickets from the passengers. It was alleged by the plaintiff that the brakeman, in passing her, pushed her off the platform and steps, and that the fall caused her serious injury.

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The question whether the plaintiff was pushed or fell accidentally; whether, if pushed, it was by an employee of the company or a passenger; whether, if by an employee, he was one of the crew of the train or an employee off duty; and whether, if not on duty in the running of the train, he still was, in the emergency which arose, acting for the company within the scope of his employment,—were submitted to the jury, with such clear and accurate instructions that it is conceded that there is no ground for objection to the general charge or to the answers to the points presented. After the charge, at the request of the plaintiff's counsel, additional instructions were given to the effect that it was not the duty of the brakeman to collect the tickets, but it was his duty to notify some one of the train crew to collect them, and if in the performance of the latter duty he left the car and went out on the platform and negligently pushed the plaintiff off, the company was responsible for his act. The objection urged to this instruction is that it widened the issue of fact by the introduction of a question not raised by the testimony, as the brakeman did in fact collect the tickets in pursuance of his announcement that he would do so, and there was no testimony that he went out of the car for any other purpose. The inquiry was clearly within the limits of the case presented. There was distinct and positive testimony by a number of employees that it was the duty of a conductor or brakeman, not one of the crew of the train on which he was riding, who saw passengers leaving a car without having given up their tickets, to notify some one of the crew, and to collect the tickets himself, if directed to do so by the conductor; and that in this particular case it was the brakeman's duty to go out of the car, and give notice to some one in authority. The distinction drawn by these witnesses between doing the thing and notifying some one to do it was not based on a written rule of the company, but on a general understanding that there should be no unauthorized interferences with those charged with the management of the train. It was

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certainly within the limits of their duty, as they understood it, to collect the tickets, if they could not give notice to the proper person to do so. The duty was concisely expressed by the answer of one of the defendant's witnesses: "We are not employed by the company to let people get away with their tickets." The brakeman who took the tickets, and whose negligence is alleged to have caused the injury to the plaintiff, left the car, at the suggestion of a conductor, to see that the tickets were collected. Presumably he went to do what the emergency required. According to his own testimony, he passed the plaintiff before he announced that he would take the tickets himself. If the act complained of was done while he was on his way to give notice, it was done while he was clearly in the line of duty. If it was done after he had decided to collect the tickets, and while on his way to do so, it was still for the jury, under all the testimony, to say whether he was then acting in the line of duty. The judgment is affirmed.

DYER

v.

FITCHBURG R. CO.

(Supreme Judicial Court of Massachusetts, Jan. 8, 1898.)

Death of Employee—Due Care by Deceased—Burden of Proof.*—The evidence tended to show that decedent, a trackman in the employ of defendant, was killed by a train in the freight yard about one o'clock in the afternoon, on one of two parallel tracks, between which there was a sufficient space for walking, but that it was part of his duty to take notice of the shifting of trains in such yard. *Held*, that plaintiff's exceptions should be overruled, there not having been sufficient evidence of due care on the part of decedent.

EXCEPTIONS by plaintiff from Worcester county superior court. *Overruled.*

*See *Parish v. Western & A. R. Co.* (Ga., 1897), 10 Am. & Eng. R. Cas., N. S., 574, and *note*, 583 *et seq.*

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W. S. B. Hopkins and Frank Bulkley Smith, for plaintiff.

Geo. A. Torrey, for defendant.

FIELD, C. J. There was not sufficient evidence of the due care of the plaintiff's intestate. Dyer, the intestate, probably was struck by the caboose of the local freight train when backing down on the west-bound track. Precisely how the accident happened does not appear. There was a sufficient space between the east and west bound tracks for Dyer to walk in safety, and no reasons appear why he should have been walking either between the rails of the west-bound track or so near to the tracks as to be hit by the caboose. He was a trackman, and the accident occurred between 1:20 and 1:30 in the afternoon, when it must have been daylight, and it was a part of his duty to take notice of the shifting trains in the freight yard. Exceptions overruled.

BUSSEY

v.

CHARLESTON & W. C. RY. CO.

(*Supreme Court of South Carolina, June 29, 1898.*)

Injury to Employee—Instructions—Province of Court.—When a charge, considered in its entirety, and with reference to the pleadings, shows that the intention of the court was to state the issues made by the pleading; and that all questions of fact were left to the consideration of the jury; it is not erroneous merely because a portion of its language, if standing alone, might be construed an invasion of the province of the jury.

Same—Same—Defective Appliances.—An instruction to the effect that a railroad employee knowingly using a defective appliance can not recover for injuries resulting therefrom, and one to the effect that the law places the duty on the master, and not on the servant, to ascertain whether the appliances furnished are safe and suitable, are not inconsistent, as they relate to distinct principles.

Same—Same.—A party desiring a more specific charge must prepare requests to that effect.

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Same—Same—Same.—That a railroad company is liable in damages for injuries to its employee resulting from its negligence in discharging its duty of furnishing safe appliances, is correct as a general proposition, and defendant cannot complain that the jury were so charged, it having failed to prepare requests for more specific instructions on such point.

Province of Court.—Defendant cannot complain because the court, in charging, assumed the existence of a fact alleged in the complaint, and not denied in the answer.

Defective Appliances—Assumption of Risk.*—A servant does not assume the risk pertaining to the use of unsafe appliances.

Vice-principals.—A railroad employee can recover for personal injuries resulting from the negligence of a fellow employee having the right to direct or control his services; the constitution of 1895 of South Carolina having enlarged the rights of such employees in this respect.

Elements of Damages.—In such action it was not error to charge that "if the jury find for the plaintiff, then he would be entitled to recover for all actual damages which he has sustained, and this would include loss of time, nurses, as well as for bodily pain and anguish of mind induced by the hurt, and all damages, present and prospective, which are naturally the proximate consequences of the act done."

APPEAL by defendant from Edgefield county circuit court of common pleas. *Affirmed.*

Sheppard Bros. and S. J. Simpson, for appellant.
Croft & Tilman, for respondent.

GARY, A. J. This is an action for damages on account of injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendant. The defendant denied all the allegations of negligence, and set up the defense of contributory negligence on the part of the plaintiff. The defendant also denied that the plaintiff's injuries were permanent, or that they were as serious as alleged. The jury rendered a verdict in favor of the plaintiff for \$5,500, but this sum, on motion for a new trial, was reduced to \$4,000. The defendant appealed, upon exceptions which we will proceed to consider :

The first and second exceptions complain of error on the part of the presiding judge as follows : "(1) In

*See note at end of case.

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charging and instructing the jury upon the subject of the amount of damages the plaintiff would be entitled to recover, as follows: 'But you must determine, if you give the plaintiff any verdict at all, from the facts and circumstances attending the case, what amount you will give him. You are to consider the physical and mental suffering which he has endured. Ordinarily, you would have to consider the expense which he was at for medical attendance, but it appears from the evidence, and the counsel admits, that the railroad company paid for his medical attendance, and therefore that is not an element of damage in this case; but his suffering, loss of time and wages, of course, which result, the impairment of his ability to work and earn such wages as he otherwise would have continued to have earned, and the permanent injury, if it be permanent, which he has received, — those are elements which you must take into consideration in determining the amount of damage;' thereby instructing the jury that they must take into consideration the several matters mentioned, and thereby stating to the jury, in effect, that the plaintiff had lost time and wages, and that his ability to work and earn such wages as he had previously earned had been impaired. (2) In charging upon the facts, and stating to the jury, as one of the facts in the case, that the plaintiff had lost time and wages, and his ability to work had been impaired; thus violating the provisions of section 26 of article 4 of the constitution of this state." Counsel for the appellant, in their argument, say: "These exceptions raise but one question,—whether, in the portion of the charge complained of, the circuit judge violated the provision of section 26 of article 4 of the constitution, and charged upon the facts." The complaint, in setting forth the injuries sustained by the plaintiff alleges that "said scantling broke in two, and caused one of the guy ropes to suddenly jerk and catch the plaintiff behind the neck, and threw him with great violence from the top of said trestle, a distance of thirty five feet, to

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the ground; thereby breaking his left thigh bone just below the hip joint, and also breaking four of his ribs on the left side, and also giving him a severe cut on the head, and also giving him severe inward bruises, which caused him hemorrhages from the lungs, and which said injuries caused the plaintiff great pain and suffering, and confined him to his bed for five weeks, and has permanently disabled him so that he never again can perform the work which he could do before receiving such injuries, to his damage in the sum of twenty thousand dollars." The defendant did not deny that the plaintiff was injured but only denied the allegations of the complaint relating to the nature, extent, and consequences of the injuries which the plaintiff is therein alleged to have sustained. The circuit judge, after using the language contained in the first exception, continued to charge the jury upon this subject as follows: "If a man is injured through the negligence of another, and his injury amounts to a total and permanent disability, as a matter of course he is entitled to a greater amount—greater measure—of damages than if the injury is not total and not permanent. So you must determine from the evidence in this case whether or not this plaintiff had been permanently injured—totally incapacitated from ever earning a livelihood—or not; and, if you should conclude that that is true, then the measure of damages would be greater. But if you are satisfied from the evidence that his injury is not of so grave a character as that, but that it only affects for the time his ability to earn his wages, or that, even if it permanently affects his ability, it does not totally destroy his ability, but simply he cannot hereafter earn as much wages as he could have done but for this, but yet can earn some livelihood, then you must take that into consideration; and your verdict—the amount of damages you award him—could not be as great as in the case of total permanent disability." In his charge the circuit judge further said to the jury: "The facts of this case are exclusively for you to determine from the evidence,

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and you are to find from the evidence what are the facts,—what is the truth of the matter,—and apply to the facts as you find them the law as given by the court, and make up your verdict in the case.” When the charge is considered in its entirety, and with reference to the pleadings, it shows (1) that the intention of the circuit judge was to state the issues made by the pleadings; and (2) that all questions of fact were left to the consideration of the jury, without any intimation as to the manner in which they should be decided. There was no error in these respects, and these exceptions are overruled.

The third exception imputes error as follows, to wit: “(3) In charging the jury, at one portion of his charge, in connection with the defendant’s ninth request, as follows: ‘That the plaintiff was in the employment of this railroad company for certain purposes, and he must exercise, as any prudent man must, his faculties for ascertaining and determining whether there is danger, and whether it is necessary—whether he is required by the obligation of his contract—to incur that danger; and, if he is not so required, if the jury are satisfied that he is not required to incur the danger, and still, in disregard either of his own knowledge of the danger or the warning of others, he still remains in the place of danger, then that constitutes negligence on his part; and so I charge you that proposition.’ And at another time in charging, as requested by the plaintiff, as follows: ‘The law places the duty on the master, and not on the servant, to exercise due care and diligence to ascertain whether the appliances furnished are safe and suitable. And a servant has the right to assume without inquiry or without examination, that the appliances furnished him are safe and suitable.’ The effect of these conflicting instructions being to leave the jury in doubt, and uninstructed, as to whether the plaintiff, under the circumstances of this case, was bound to exercise any care in determining whether it would be safe for him to act as he did act at the time of the accident.” The words

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contained in the first quotation set forth in the exception were used by the presiding judge in disposing of the defendant's ninth request to charge which was as follows: "It is the duty of an employee to exercise care to avoid injuries to himself. Hence, if the jury believe that the plaintiff was warned of the danger of the position in which he was at the time of the injury, and that he disregarded the warning, he cannot recover." The words in the second quotation set forth in the exception are the same as those in the plaintiff's third request to charge. It will be observed that the only error of which this exception complains is that the effect of the two instructions was to leave the jury in doubt, and uninstructed, as to whether the plaintiff was bound to exercise any care in determining whether it was safe for him to act as he did at the time of the accident. When the language contained in the first quotation set forth in the exception is analyzed, it will be seen (1) that the plaintiff was required to exercise ordinary care in determining whether there was danger; (2) that he was required to exercise ordinary care in determining whether it was necessary, under the obligations of his contract, to incur that danger; and (3) that if, in disregard either of his own knowledge of the danger, or the warning of others, he still remained in the place of danger, then that would constitute negligence on his part. Not only did the presiding judge charge the jury as to the care which the plaintiff was bound to exercise under the circumstances, but he charged the law too favorably to the defendant. It is the duty of the master to provide suitable machinery and appliances, and to keep them in proper repair. The employee has the right to assume that the master has discharged his duty in this respect, and is not bound to exercise care in ascertaining whether the master has so acted. When, however, the employee has knowledge or receives warning that the master has not furnished suitable machinery, or that it has not been kept in proper repair, so that it has become dangerous, and he continues to use the same after such knowledge or warning,

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then it is a question to be determined by the jury whether, under the circumstances, the employee failed to exercise ordinary care and prudence, and was thereby guilty of negligence. The circuit judge is only allowed to charge that there is negligence on the part of the employee when but one inference can be drawn from the conduct of the employee. In all other cases the question of negligence is to be determined by the jury. *Wade v. Power Co.*, 51 S. C. —, 29 S. E. 233; *Holzman v. Douglas*, 18 Sup. Ct. 65. In this case more than one inference could reasonably be drawn from the testimony, and the presiding judge charged too favorably to the defendant, in saying that the facts mentioned in the exception, if found to be true, would constitute negligence. Inferences to be drawn from the facts are ordinarily for the consideration of the jury. The instructions mentioned in the exceptions relate to distinct principles, and are not inconsistent. This exception is overruled.

The fourth exception alleges error on the part of the presiding judge as follows: "(4) in neglecting to charge the jury, clearly and specifically, as required by section

26 of article 4 of the constitution, what degree of care the plaintiff was bound to exercise in ascertaining whether there was danger of injury to him at the time of the accident." We have shown, in considering the third exception, that the presiding judge did charge the jury as to the degree of care which the plaintiff was bound to exercise in ascertaining if there was danger, and that the charge was too favorable to the defendant. If the defendant desired the presiding judge to charge more specifically, it was its duty to have prepared requests to that effect. This exception is overruled.

The fifth exception alleges error as follows: "(5) In charging the jury as follows: 'It was the duty of the defendant to furnish the plaintiff with a safe and sound scantling, and safe and sound appliances. for him to work upon in assisting to raise and load the pile-driving hammer mentioned in the complaint; and if the jury find from the evidence

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that the defendant negligently failed to perform either of these duties, as to the scantling used by plaintiff, or the appliances used in loading such hammer, at the time of the accident to the plaintiff, and the injuries which the plaintiff might have received from such accident, if they find that he was then injured, whether caused by the unsafe scantling or unfit appliance used in attempting to load the pile-driving hammer, and the unfit condition of said scantling and appliance, were the cause of the plaintiff being injured, then he would be entitled to the verdict;’ thereby instructing the jury, in effect, that, before defendant could be held not guilty of negligence, it must appear that the scantling used was safe and sound,—whether it appeared to be safe and sound or not, and whatever the defendant’s agent then in charge of the work may have thought, and had reason to think, as to its safety and soundness.” The defendant alleges error further, under this exception, in that the circuit judge, in charging the jury, assumed as a fact that the plaintiff was required to assist in raising the pile-driving hammer, and worked with the appliances then furnished; thus violating the provisions of section 26 of article 4 of the constitution. The charge was correct as a general proposition, and substantially stated the law upon that subject; and, if the defendant desired his honor to charge more specifically, it was its duty to have prepared requests embodying such propositions. This disposes of the first ground of objection set forth in the exception.

Province of Court.

The fourth paragraph of the complaint, *inter alia*, alleges:“(4) That on the 17th day of June, 1897, while the plaintiff was an employee of the defendants, and at work with said trestle gang upon a trestle on said line of railway, near the town of Laurens, in this state, under one E. S. McKinley, who was in charge of said trestle gang for the defendants, and who controlled and directed the services of the plaintiff, the defendants, through their said representative, undertook with said trestle gang (the plaintiff being one of the number), to raise a pile-driving hammer, weighing one thousand

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eight hundred pounds, from the base of said trestle, and to load the same on the cars, standing on the trestle, being at a height of thirty-five feet, without any intervening support therefor." These allegations were not denied by the answer, and were therefore admitted. Having admitted the fact, the defendant cannot complain if the circuit judge assumed it to be a fact. This disposes of the second ground of objection in the exception, and the exception is overruled.

The sixth exception alleges error as follows: "(6th) In charging the jury as follows: 'While it is true that a servant who enters the employment of another assumes the ordinary risks of business, this would not include the risks of working with unsafe appliances; for the master is bound to supply his servants with sound and safe appliances, and to keep the same in sound and safe condition;' thus instructing the jury in effect, that the master was bound in law to guaranty the soundness and safety of all machinery he furnishes his employees. And this instruction to the jury, defendant submits is further erroneous in that it did not take into consideration latent defects in machinery, but was calculated to lead the jury to believe that so far as any defects in machinery are concerned, whether patent or latent an employee takes no risk with reference thereto." The charge stated in general terms a correct proposition of law, and if the defendant desired that the presiding judge should have charged more specifically, it had the right to present requests to that effect. Furthermore, when this part of the charge is considered in connection with the other parts of the charge it will be seen that the presiding judge did not, in effect, instruct the jury that the master was bound in law to guaranty the soundness and safety of the machinery furnished an employee. This disposes of the first ground of objection stated in the exception, and the second ground therein stated is disposed of by what was said in considering the fifth exception. This exception is overruled.

Defective Appliances—Assumption of Risk.

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The seventh exception complains of error as follows: "(7) In charging the jury, as requested in the ninth request, that the constitution of 1895 enlarged the rights of the employees of railroad companies to recover for injuries as therein stated, and in defining such request to the jury as he did." The ninth request is as follows: "(9) That the constitution of this state of 1895 has enlarged the rights of an employee of a railroad corporation as to his remedies for any injury suffered by him from the acts or omissions of said corporation or its employees, and he now has the same right to recover for an injury as other persons not employees have, when the injury results from negligence of a superior agent or officer of the corporation, or of a person having a right to control or direct the services of a party injured; and if the jury find from the evidence that the plaintiff was injured while in the service of the defendant, and that at such time he was working under the direction of a servant of the defendant who had the right to control or direct the services of the plaintiff, and that the injury to the plaintiff resulted from the negligence of such servant of the defendant, then the plaintiff would be entitled to recover." His honor said: "I charge you that. It means that if the negligence of this superintendent, and his agents, of this railway company, caused the injury, that was negligence of the railroad company itself. The principal is liable for the negligence of his agent in the course of his employment." Waiving the objection to the exception on the ground that it is too general for consideration, we see no error in the ruling of the presiding judge, and this exception is overruled.

Vice Principals.

The eighth exception alleges error as follows: "(8) In charging as requested in the tenth request, and thus making it obligatory on the jury to include the matters therein mentioned in assessing the plaintiff's damage." The tenth request is as follows: "(10) If the jury find for the plaintiff, then he would be entitled to recover for all actual dam-

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ages which he has sustained, and this would include loss of time, nurses, as well as for bodily pain and anguish of mind induced by the hurt, and all damages, present and prospective, which are naturally the proximate consequences of the act done and the injuries received, not only present loss, or that which has already occurred, from the incapacity of the injured party to attend to his ordinary pursuits, and expenses which he has incurred for other necessary outlays, but as only one action can be brought, and only one recovery had, it is proper to include in the estimate of damages compensation for whatever it may be reasonably certain will result from incapacity in consequence of his injury. So, also, his loss of capacity for work or attention to his ordinary business must be included, whether it be physical or mental, present or prospective." Waiving the objection to this exception on the ground that it is too general, we see no error in the charge. This exception is overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

NOTES.

Master and Servant—Assumption of Risk from Defective Appliances—General Rule.—A servant does not assume the risk of any dangers arising from unsafe or defective methods, surroundings, machinery, or other instrumentalities, unless he has, or may be presumed to have, knowledge or notice thereof. *Clapp v. Minneapolis, etc., R. Co.*, 36 Minn. 6. See generally *Smith v. Peninsular Car Works*, 60 Mich. 508; *Cook v. St. P. M. & M. R. Co.*, 34 Minn. 45; *Hobbs v. Stauer*, 62 Wis. 108; *Behm v. Armour (Wis.)*, 58 Wis. 1; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 24 Am. & Eng. R. Cas. 407, 6 Sup. Ct. Rep. 590; *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18, 28 Am. & Eng. R. Cas. 308; *Galveston etc. R. Co. v. Lempe*, 59 Tex. 19; *Pittsb., etc., Co. v. Adams*, 105 Ind. 151; *Cole v. C. & N. W. R. Co.*, 67 Wis. 272; *Lopez v. Central Arizona Mfg. Co.*, 1 Ariz. 464; *Malone v. Hamley*, 46 Cal. 409; *Sanborn v. Madeira, etc., Co.*, 70 Cal. 261; *Wells v. Cole*, 9 Colo. 159; *Central, etc., Co. v. Haslett*, 74 Ga. 59; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Toledo, etc., R. Co. v. Eddy*, 72 Ill. 138; *St. Louis, etc., R. Co. v. Britz*, 72 Ill. 257; *Chicago R. Co. v. Munroe*, 85 Ill. 25; *Morris v. Gleason*, 4 Ill. App. 395; *Chicago, etc., R. Co. v. Clark*, 11 Ill. App. 104; *Chicago, etc., R. Co. v. Simmons*, 11 Ill. App. 147. Compare *Illinois, etc., R. Co. v. Jones*, 11 Ill. App. 324. Also see *Chicago, etc., R. Co. v. Lonergan*, 118 Ill. 41; *Coal Run, etc., Co. v. Jones*, 19 Ill. App. 365; *Umbach v. Lake Shore, etc., R. Co.*, 83

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Ind. 191; Lake Shore, etc., R. Co. v. Stupak, 108 Ind. 1; Kitteringham v. Sioux City, etc., R. Co., 62 Iowa 285; Heath v. Whitebreast, etc., Min. Co., 65 Iowa 737; Perigo v. C. R. I. & P. R. Co., 55 Iowa 326; Money v. Lower View, etc., Co., 55 Iowa 671; Wells v. Burlington, etc., R. Co., 56 Iowa 520; Mayes v. Chicago, etc., R. Co., 63 Iowa 562; Brown v. Chicago, etc., R. Co., 69 Iowa 161; Lane v. Central Iowa R. Co., 69 Iowa 443; Kansas, etc., R. Co. v. Peavey, 34 Kan. 472; Sanborn v. Atchison, etc., R. Co., 35 Kan. 292; McQueen v. Central Branch, etc., R. Co., 30 Kan. 689, 15 Am. & Eng. R. Cas. 226; Bogenschutz v. Smith (Ky.), 15 W. Rep. 578; Ladd v. New Bedford R. Co., 119 Mass. 412; Lovejoy v. Boston, etc., R. Co., 125 Mass. 79; Pingree v. Leyland, 135 Mass. 398; Clark v. Soule, 137 Mass. 380; Russell v. Tillotson, 140 Mass. 201; Buzzell v. Laconia Mfg. Co., 48 Me. 113; Davis v. Detroit, etc., R. Co., 20 Mich. 205; McGinnis v. Canada, etc., R. Co., 49 Mich. 466, 8 Am. & Eng. R. Cas. 135; Gates v. Southern, etc., R. Co. 28 Minn. 110, 2 Am. & Eng. R. Cas. 237; Clark v. St. Paul, etc., R. Co., 28 Minn. 128, 2 Am. & Eng. R. Cas. 240; Fraker v. St. Paul, etc., R. Co., 32 Minn. 54, 15 Am. & Eng. R. Cas. 256; Russell v. Minneapolis, etc., R. Co., 32 Minn. 230; Olson v. McMullen, 39 Minn. 94; Kelley v. Chicago, etc., R. Co., 35 Minn. 490; Laning v. New York, etc., R. Co., 39 N. Y. 521; Monaghan v. New York, etc., R. Co., 45 Hun (N. Y.) 118; Bahn v. Hanemeyer, 53 Hun (N. Y.) 557; Shaw v. Sheldon, 103 N. Y. 667; Mad River, etc., R. Co. v. Barber, 5 Ohio St. 541; Wells v. Coe, 9 Colo. 159; Shaffer v. Haish, 110 Pa. St. 575; Rummell v. Dilworth, 111 Pa. St. 343; Wanamaker v. Burke, 111 Pa. St. 425; Drew v. Gaylord Coal Co. (Pa.), 1886, 4 Atl. Rep. 214; Brassman v. Lehigh Valley R. Co., 113 Pa. St. 491.

See also, 9 Am. & Eng. R. Cas., N. S., *note*, 347; Thompson v. Missouri Pac. Ry. Co., (Neb. 1897), 8 *id.*, *abstr.*, 762, 71 N. W. Rep. 61; Chicago, etc., R. Co. v. Curtis, Neb. 1897, 8 *id.*, *abstr.*, 762, 71 N. W. Rep. 42; Holt v. Chicago, etc., Ry. Co., (Wis. 1896) 7 *id.*, *abstr.*, 774, 69 N. W. Rep. 352; Huffman v. Michigan Cent. R. Co. (Mich. 1896), 5 *id.*, 542, 44 Am. & Eng. R. Cas., *note*, 535 *et seq.*, 24 *id.*, *note* 429 *et seq.*, and see numerous other notes and cases in Am. & Eng. R. Cas. from vol. 1 to vol. 60.

Same—Latent Defects.—The employee is not bound to know latent, but only patent defects. Bland v. Shreveport Belt-Ry. Co., (La. 1896) 4 Am. & Eng. R. Cas., N. S., 349. But the servant does assume all risk of latent defects in machinery and appliances unknown to the master unless the master was negligent in not discovering the same. Ballou v. Chicago, etc., R. Co., 54 Wis. 257, 5 Am. & Eng. R. Cas. 480; Wedgewood v. Chicago, etc., R. Co., 41 Wis. 478; Smith v. Chicago, etc., R. Co., 42 Wis. 520; Morrison v. Phillips, etc., Cons. Co., 44 Wis. 405; Steffen v. Chicago, etc., R. Co., 46 Wis. 265; Indianapolis, etc., R. Co. v. Toy, 91 Ill. 474; East St. Louis, etc., Packing Co. v. Hightower, 92 Ill. 139; Degraff v. New York, etc., R. Co., 76 N. Y. 125; Warner v. Erie, etc., R. Co., 39 N. Y. 468.

Same—Continuing in Employment without Objection after Knowledge of Defect.—When a servant of a railroad company becomes aware of the fact that the apparatus which he is using is defective, notwithstanding which he continues the use of it without objection, he will be deemed to have assumed the risk of his employment, and cannot recover in case of injury. Patterson v. Pittsburgh, etc., R. Co., 76 Pa. St. 389; Davis v. Detroit, etc., R. Co., 20 Mich. 105; McMillan v. Saratoga, etc., R. Co., 20 Barb. 449; Toledo, etc., R. Co.

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v. Eddy, 72 Ill. 138; *Dillon v. Union Pac. R. Co.*, 3 Dillon, 319; *Chicago, etc., R. Co. v. Munroe*, 85 Ill. 25; *Ladd v. New Bedford R. Co.*, 119 Mass. 412; *Hamathy v. Northern, etc., R. Co.*, 46 Md. 280; *Devitt v. Pacific R. Co.*, 50 Mo. 302; *International R. Co. v. Doyle*, 49 Tex. 190; *Dale v. St. Louis, etc., R. Co.*, 63 Mo. 455; *Georgia R. Co. v. Kenney*, 58 Ga. 485; *Green & Coates Sts. Pass. R. Co. v. Bresmer*, 4 Am. & Eng. R. Cas. 647; *Naylor v. Chicago, etc., R. Co.*, 5 Am. & Eng. R. Cas. 460; *Houston & T. C. R. Co. v. Myers*, 8 Am. & Eng. R. Cas. 114; *Louisville, etc., R. R. Co. v. Orr*, 8 Am. & Eng. R. Cas. 94; *Umbach v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 98; *Sweeney v. Central Pacific R. Co.*, 8 Am. & Eng. R. Cas. 151; *Watson v. Houston & T. C. R. Co.*, 11 Am. & Eng. R. Cas. 213; *Jackson v. Kansas City, L. & S. K. R. Co.*, 15 Am. & Eng. R. Cas. 178; *East Tenn., etc., R. Co. v. Smith*, 15 Am. & Eng. R. Cas. 224; *Yeaton v. Boston & Lowell R. Corp.*, 15 Am. & Eng. R. Cas. 253.

If a person in the employment of a railroad company discovers that the appliances with which he is working are or have become through use unsafe, and continues without any special order of the company, and without making any complaint, to use the said appliances, he will be held to have either run the risk of being injured or to have been guilty of contributory negligence; and hence, in case of an injury to him occasioned by such defect, the company will not be held liable. And this is true even though the defect be such an one as under ordinary circumstances the company would be bound to repair. *Woodley v. Metropolitan R. R. Co.*, L. R., 2 Exch. Div. 384; *Kielly v. Belcher, etc., Mining Co.*, 3 Sawyer, 500; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Georgia R. R. Co. v. Kenney*, 58 Ga. 485; *Lumley v. Caswell*, 47 Iowa, 159; *Chicago R. R. Co. v. Munroe*, 85 Ill. 25; *Sullivan v. Louisville R. R. Co.*, 9 Bush. 81; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; *Hamathy v. Northern, etc., R. R. Co.*, 46 Md. 280; *Ft. Wayne, etc., R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Crutchfield v. Richmond, etc., R. R. Co.*, 78 N. C. 300; *Gilson v. Erie R. R. Co.*, 63 N. Y. 449; *Oakbridge Coal Co. v. Reed*, 6 Cent. L. J. 275; *Morris v. Gleason*, 4 Ill. App. 395; *Ford v. Fitchburg R. R. Co.*, 110 Mass.; *Mehan v. S. B. & N. Y. R. R. Co.*, 73 N. Y. 585; *Mich. Cent. R. R. Co. v. Austin*, 40 Mich.

If a servant, after discovering the danger of using some appliance, continues to work when he must of necessity use it, he assumes the risk, and the master is discharged from liability. *Railroad Co. v. Shertle*, 2 Am. & Eng. R. Cas. 158, *note*. See also *Brossman v. Lehigh Val. R. Co. (Pa.)*, 6 Atl. Rep. 226; *Drew v. Gaylord Coal Co. (Pa.)*, 4 Atl. Rep. 214; *Wanamaker v. Burke (Pa.)*, 2 Atl. Rep. 500; *Rummell v. Dillworth*, *Id.* 335; *Shaffer v. Haish, (Pa.)*, 1 Atl. Rep. 575; *Shaw v. Sheldon, (N. Y.)*, 9 N. E. Rep. 183; *Coal Run Coal Co. v. Jones (Ill.)*, 8 N. E. Rep. 865; *Lake Shore & M. S. R. Co. v. Stupak (Ind.)*, 8 N. E. Rep. 630; *Rock v. Indian Orchard Mills (Mass.)*, 8 N. E. Rep. 401; *Chicago, R. I. & P. R. Co. v. Londergan (Ill.)*, 7 N. E. Rep. 55; *Sweeney v. Berlin & Jones Envelope Co. (N. Y.)*, 5 N. E. Rep. 358; *Russell v. Tillotson (Mass.)*, 4 N. E. Rep. 231; *Stafford v. Chicago, B. & Q. R. Co. (Ill.)*, 2 N. E. Rep. 185; *Leary v. Boston & A. R. Co. (Mass.)*, 2 N. E. Rep. 115; *Bunt v. Sierra Buttes Gold Min. Co.*, 24 Fed. Rep. 847; *Hall v. Union Pac. R. Co.*, 15 Fed. Rep. 744; *Lane v. Central Iowa R. Co. (Iowa)*, 29 N. W. Rep. 419; *Barbo v. Bassett*

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(Minn.), 29 N. W. Rep. 198; *Kelley v. Chicago*, St. P., M. & O. R. Co., *Id.* 173, and *note*; *Brown v. Chicago*, R. I. & P. R. Co. (Iowa), 28 N. W. Rep. 487; *Olson v. McMullen* (Minn.), 24 N. W. Rep. 318; *Heath v. Whitebreast C. & M. Co.* (Iowa), 23 N. W. Rep. 148; *Hobbs v. Stauer* (Wis.), 22 N. W. Rep. 153; *Russell v. Minneapolis & St. L. R. Co.* (Minn.) 20 N. W. Rep. 147; *Fraker v. St. Paul, M. & M. R. Co.* (Minn.), 19 N. W. Rep. 349; *Mays v. Chicago*, R. I. & P. R. Co. (Iowa), 19 N. W. Rep. 680; s. c., 14 N. W. Rep. 340; *Richards v. Rough* (Mich.), 18 N. W. Rep. 785; *Behm v. Armour*, 15 N. W. Rep. 806; *McGinnis v. Canada S. B. Co.* (Mich.), 13 N. W. Rep. 819; *Clark v. St. Paul & S. C. R. Co.* (Minn.), 9 N. W. Rep. 581; *Gates v. Southern Minn. R. Co.*, *Id.* 579; *Wells v. Burlington*, C. R. & N. R. Co. (Iowa), 9 N. W. Rep. 364; *Mooney v. Lower Vein Coal Co.* (Iowa), 8 N. W. Rep. 652; *Perigo v. Chicago*, R. I. & P. R. Co. (Iowa), 7 N. W. Rep. 627; *Sanborn v. Madera Flume & Trading Co.* (Cal.), 11 Pac. Rep. 710; *Wells v. Coe* (Or.), 11 Pac. Rep. 50; *Sanborn v. Atchison*, T. & S. F. R. Co. (Kan.), 10 Pac. Rep. 860; *Kansas Pac. R. Co. v. Peavey* (Kan.), 8 Pac. Rep. 780; *Lopez v. Central Arizona Min. Co.* (Ariz.), 2 Pac. Rep. 748; *Bogenschutz v. Smith* (Ky.), 1 S. W. Rep. 578.

But even if the master furnishes improper appliances and fails to make needed repairs or changes, or otherwise renders the service needlessly perilous, his negligence is deemed waived by the servant, if the latter, after comprehending the risk, continues in the employment without protest or promise of amendment by the employer. *Perigo v. R. R. Co.*, 52 Ia. 276; *St. Louis, etc., Co. v. Britz*, 72 Ill. 256; *Dillon v. U. P. R. R. Co.*, 3 Dill. 319; *Swoboda v. Ward*, 40 Mich. 423; *Holmes v. Worthington*, 2 F. & F. 533; *Ballou v. C. & N. W. Ry. Co.*, 5 Am. & Eng. R. Cas. and *note*, p. 480.

Same—Using under Protest.—A section hand upon a railroad does not assume the risk from using defective tools, which he objects to using, but which he is ordered to use by his superior officer. *East Tennessee, etc., R. Co. v. Duffield*, 12 Lea (Tenn.), 63; s. c. 18 Am. & Eng. R. Cas. 35; *Greenleaf v. Dubuque, etc., R. Co.*, 33 Iowa, 52; *Patterson v. Pittsburgh, etc., R. Co.*, 76 Pa. St. 389; *Snow v. Housatonic, etc., R. Co.*, 8 Allen 441; *Clarke v. Holmes*, 7 Hurlst. & N. 937; *Dale v. St. Louis, etc., R. Co.* 63 Mo. 455.

Same—Using Defective Apparatus under Promise of Company to Repair.—When a servant becoming aware of a defect in the machinery which he is called upon to use complains to the proper officers of the company and is requested by said officer to continue to use it, the request being coupled with a promise that the defect will shortly be remedied, it is not necessarily the case that the servant is guilty of contributory negligence in continuing the use of the machinery. The question is for the jury. *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Laning v. New York, etc., R. Co.*, 49 N. Y. 521; *Crutchfield v. Richmond, etc., R. Co.*, 78 N. C. 300; *Kroy v. Chicago, etc., R. Co.*, 32 Iowa, 357; *Greenleaf v. Dubuque, etc., R. Co.*, 33 Iowa, 52; *Muldowney v. Illinois, etc., R. Co.*, 39 Iowa, 615; *Way v. Illinois, etc., R. Co.*, 40 Iowa, 341; *Belair v. Chicago, etc., R. Co.*, 43 Iowa, 662; *Shawny v. Androscoggin Mills*, 66 Me. 420; *Little Rock & Ft. Smith R. Co. v. Duffey*, 4 Am. & Eng. R. Cas. 637; *Greene v. Minneapolis & St. L. R. Co.*, 15 Am. & Eng. R. Cas. 214.

A switching engine used in the defendant's yard being laid up for

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repairs, a road engine having the usual pilot bars was put temporarily to do its work. The plaintiff's intestate, a brakeman, complained to the yardmaster of the danger of using this engine without foot-boards, and asked that he might put them on, but was dissuaded by the yardmaster's saying that the engine would not be used over one week. The brakeman was shortly afterwards killed by the use of this engine. It was held that the complaint and promise rendered the company liable. The court said: "If such assurance was made, and deceased was induced thereby to continue in the employment, then, as we have seen, the defendant assumed the risks incident to the performance of the work without running-boards until such boards should be furnished. The foregoing views of the law are so uniformly sustained by the authorities, that we do not deem it necessary to make citations." *Picart v. Chicago, etc., R. Co.*, 82 Iowa, 148.

The plaintiff, a switchman, standing on the step at the end of the tank, to uncouple some cars which were to be "kicked" upon a side track, by reason of a defect in the step, and because there was no railing to hold to, was thrown off by a jerk of the engine and injured. He had complained of these defects, and he with others had notified the yardmaster that they would quit if they were not remedied. They were persuaded to remain by a promise that the defects would be remedied. This was not done. It was held that if they were persuaded to remain by reason of this promise the company was rendered thereby liable. If the plaintiff remained in the service and worked on this engine with knowledge that the defects had not been remedied, after a reasonable time had elapsed in which to make them, he will be considered as having assumed the risk. What should be considered a reasonable time is a question for the jury, to be determined by a consideration of all the circumstances, such as the opportunity for making repairs and the frequency with which the engine was used. *Lyttle v. Chicago, etc., R. Co.*, 84 Mich. 289. See also *Indianapolis Union R. Co. v. Ott*, 11 Ind. App. 564.

Although a servant does not assume the risk of defective machinery, by remaining a reasonable time in the employment, after the master has promised to repair the same, yet the contrary is the case if he remains after such period has elapsed. The question of reasonable time is one of fact for the jury. *Stephenson v. Duncan*, 73 Wis. 404; *Union Mfg. Co. v. Morrissey* (Ohio), 22 Am. L. Reg. 574; *Hough v. Texas, etc., R. Co.*, 100 U. S. 225; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Patterson v. Pittsburgh, etc., R. Co.*, 76 Pa. St. 389; *Le Clair v. First Div. St. P. & P. R. Co.*, 20 Minn. 9; *Brabbitt v. Chicago, etc., R. Co.*, 38 Wis. 289; *Holmes v. Worthington*, 2 Fos. & Fin. 533; *Holmes v. Clarke*, 6 H. & N. 937; *Clarke v. Holmes*, 7 H. & N. 937; *Little Rock, etc., R. Co. v. Duffey*, 35 Ark. 602, 4 Am. & Eng. R. Cas. 637; *Texas, etc., R. Co. v. Kane* (Tex. 1883), 15 Am. & Eng. R. Cas. 218; *Greenleaf v. Illinois, etc., R. Co.*, 29 Iowa 14; *Kroy v. Chicago, etc., R. Co.*, 32 Iowa 357; *Greenleaf v. Dubuque R. Co.*, 33 Iowa 52; *Way v. Illinois, etc., R. Co.*, 40 Iowa 341; *Lumley v. Caswell*, 47 Iowa 159; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Reed v. Northfield*, 13 Pick. (Mass.) 94; *Whittaker v. Boylston*, 97 Mass. 273; *I. & St. L. R. Co. v. Watson*, 114 Ind. 21; *Parody v. Chicago, etc., R. Co.*, 15 Fed. Rep. 205; *Gulf, etc., R. Co. v. Donnelly*, 70 Tex. 371; *Greene v. Minneapolis, etc., R. Co.*, 31 Minn. 243, 15 Am. & Eng. R. Cas. 214; *Conroy v. Vulcan Iron Works*, 6 Mo. App. 102.

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But where the instrumentality with which the servant is required to perform service is so glaringly and palpably dangerous that a man of common prudence would not use it, and with the utmost care and skill danger is still imminent, the master cannot be held responsible for the damage resulting therefrom, although the servant may have notified him of the danger, and he may have promised to repair it. *Conroy v. Vulcan Iron Works*, 62 Mo. 35. See *Patterson v. P. & C. R. Co.*, 76 Pa. St. 389; *McQueen v. Central Branch, etc.*, R. Co., 30 Kan. 689, 15 Am. & Eng. R. Cas. 226; *East Tennessee, etc., R. Co. v. Smith*, 9 Lea (Tenn.) 685, 15 Am. & Eng. R. Cas. 224.

Same—Burden of Proving Servant's Knowledge of Defects.—The burden of proving that an injured servant had knowledge of an obstruction or defect before an accident is on the employer. *Hullehan v. Green Bay, etc., R. Co.*, 68 Wis. 520, 31 Am. & Eng. R. Cas. 322. See *Wells v. Burlington, etc., R. Co.*, 56 Iowa 520, 2 Am. & Eng. R. Cas. 243, *Hudson v. Charleston, C. & C. R. Co.*, 41 Am. & Eng. R. Cas. 348, 104 N. Car. 491, 10 S. E. Rep. 669.

But where a plaintiff who is injured by the use of defective appliances is shown to have knowledge of them, the burden is upon him to show that he protested against their use, and was induced to continue by the master's promise to repair. *Ford v. Chicago, etc., R. Co.*, (Iowa 1897) 71 N. W. Rep. 332.

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v.

CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa, May 27, 1898.)

Injury to Employee—Defective Appliances—Burden of Proof.—In an action for the wrongful death of plaintiff's decedent a brakeman, resulting from a defective cattle guard, plaintiff having admitted decedent's knowledge of the defect, the burden was upon plaintiff to show that his decedent was in some manner justified in exposing himself to danger from such cattle guard.

Same—Instructions—Waiver.*—The court did not cure the error of failing to so instruct the jury as to the burden of proof by telling them that plaintiff conceded that his decedent knew of such defect, waiver in such cases consisting in remaining in the employment, after knowledge, without objection, and without promise of amendment.

Duty to Instruct.—When the court, in the absence of a request, undertakes to instruct, it must do so correctly.

*See *Bussey v. Charleston & W. C. R. Co.*, *ante*, and extensive note on assumption of risk from defective appliances.

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Conflicting Instructions.—Contradictory and conflicting instructions are erroneous, except where the court can say there was no prejudice.

Unwarranted Instructions.—An instruction not warranted by the pleadings is erroneous; and the rule applies where only a specific act of contributory negligence is alleged.

Contributory Negligence.—An instruction that plaintiff could recover if the death of his decedent resulted from a defective cattle guard, should have been qualified by presenting therein for the consideration of the jury the defenses of contributory negligence and waiver.

APPEAL by defendant from Cedar county district court. *Reversed.*

Robert Mather, Cook & Dodge and T. B. Hanley,
for appellant.

Preston, Wheeler & Moffit, for appellee.

DEEMER, C. J. This is the third time this case has been before us. The first opinion will be found in 91 Iowa, 179, 59 N. W. 5; the second in 71 N. W. 332.

Case Stated. A rehearing was granted on the second appeal, and the case has again received most careful consideration. The facts are fully set out in the first opinion, and need not be repeated, except in so far as they may be necessary to a full understanding of the points decided upon this appeal.

The court instructed that under the issues the burden was on plaintiff to establish the alleged negligence, the injury to the estate, and consequent damage; and on defendant "to establish by a fair preponderance of the evidence the allegations which it makes against plaintiff's intestate, and which it charges contributed to his injury, as well as to establish any waiver claimed by it." This was the only instruction relating to the burden of proof which was given. The reply filed by plaintiff admitted that her intestate knew of the cattle guard, and that it was dangerous, and that with such knowledge he continued in the employment of the defendant. But, in avoidance, plaintiff pleaded protest and promise of repair. It is evident that the court was in error in placing the burden on defendant of proving a matter which was admitted in the pleadings. Appellee con-

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tends, however, that waiver consists of four ingredients, *viz.* knowledge of danger, continuance in employment, absence of protest, and absence of promise to repair; and that the burden was on defendant to prove each and all of these propositions. The case of *Worden v. Railway Co.*, 72 Iowa, 201, 33 N. W. 629, is cited in support of this proposition. In that case the defendant alleged that deceased, long prior to the injury, had full knowledge of the condition of the track, and continued in the service without objection, and without promise of any change. The question here presented does not seem to have been argued in that case, for the reason, no doubt, that defendant pleaded absence of protest and promise to repair. It is true we said "that the instruction, standing by itself, does not express the law, because it omits the element of waiver, which consists in remaining, after knowledge, without objection, and without promise of amendment." This is a correct statement of the law, but it does not support the appellee's contention in this case. No reference is made to the burden of the proof, and no attempt was made to determine where it should be placed. The question was determined adversely to appellee in the case of *Coates v. Railroad Co.*, 62 Iowa, 486, 17 N. W. 760. In that case it is said, after referring to the case of *Wells v. Railway Co.*, 56 Iowa, 520, 9 N. W. 364, which requires the defendant to prove that the person injured had knowledge of the danger: "We think that, when the defendant has shown that fact, it may well rest upon it as a defense, and that, in the absence of some excuse from the plaintiff for exposing himself to dangers known to him, there can be no recovery. It is a general rule (subject, of course to some exceptions) that a party to an action is not required to establish the negative of a proposition. When the defendant shows that the plaintiff knew of the dangerous condition of the road or machinery which he aided to operate, it is then incumbent on the plaintiff to show that he was in some manner justifiable in exposing himself to

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the danger. The fact that such proof cannot be made in some cases, where the injury results in death, is no reason why the rule that the party who holds the affirmative of an issue is required to assume the burden of proof should not be enforced. If the burden had been held to rest on the defendant to prove the negative, it would have been required to introduce as witnesses all of its officers and employees to whom such notice might be properly given, and prove by them that no complaint was made." This is a correct statement of the rule as we understand it, and is a complete answer to appellee's argument. In the argument upon

Same—Instructions—Waiver.

rehearing appellee concedes the error in the instruction, but argues that it was without prejudice, for the reason that in another instruction, to wit, the eighth, the court told the jury that plaintiff conceded that deceased knew of the location and construction of the cattle guard when he entered defendant's service as a switchman. It is true, such a statement is found in the eighth paragraph of the charge, but it has no reference to the question as to the burden of the proof. It relates simply to the matter of waiver, and is a correct statement of the law upon that subject. But how are we to know but that the jury understood the word "waiver," as used in instruction 4, as appellee's counsel understood it? As said in the Worden Case, "waiver consists in remaining, after knowledge, without objection, and without promise of amendment." So counsel understood it, and the jury, no doubt, had, the same idea. If they did, then the fourth instruction cast upon defendant the burden of proving absence of protest, and promise of repair. Again, it is suggested that, as defendant asked no instruction with reference to the burden of proof, it is not in position to complain. It is true, no instruction was asked; but the court, in

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the absence of a request, undertook to state where the burden was as to each and every issue presented by the pleadings; and the rule is well settled that, when the court attempts to so instruct, it must do so correctly, whether request be made or not.

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State v. Pennell, 56 Iowa, 29, 8 N. W. 686. As the reply admitted knowledge of the defect, and continuance in the employment, plaintiff was not entitled to recover without proving affirmatively that the deceased protested against the defect and was promised that it should be repaired. No such instruction was given. On the contrary, the court said that, under the issues as tendered, the plaintiff need only prove the alleged negligence, the injury to the estate she represented, and the consequent damage. Surely, this was error of the most prejudicial kind. Moreover, as the court instructed that the burden was upon the defendant to establish the allegations which it made against the plaintiff's intestate, as well as to establish any waiver claimed by it, and at the same time instructed that plaintiff had admitted that her intestate had knowledge of the defect and the dangers incident thereto, it is evident that something more was intended by the use of the word "waiver" than mere knowledge and continuance in employment. Counsel for appellee certainly had this idea upon the original submission, and it is strange if the jury did not reach the same conclusion. When error appears, prejudice will be presumed, until the contrary affirmatively appears. With this rule in mind, it seems quite clear that there was not only error, but that the error was prejudicial. But it is said the instructions, taken as a whole, are not erroneous. This argument is based upon the thought that the jury understood the term "waiver" to mean no more than knowledge of the defect, and continuance in the employment, and further proceeds upon the idea that, as the eighth instruction states that these matters were admitted, there was no prejudice. The fault in this argument lies in the fact, that, if the instructions are so construed, they are in direct conflict; one saying that the burden was upon defendant to prove a certain state of facts; and others, that this same state of facts was admitted by the plaintiff. Contradictory and conflicting instructions are almost universally held to be erroneous, except in cases where the court can

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say there was no prejudice. See *Carlin v. Railroad Co.*, 31 Iowa, 371; *Potter v. Railroad Co.*, 46 Iowa, 399; *Roby v. Appanoose Co.*, 63 Iowa, 113, 18 N. W. 711; *Blaul v. Thrap*, 83 Iowa, 665, 49 N. W. 1044. From any point of view, the instruction was erroneous, and, as the error does not affirmatively appear to have been without prejudice, the case must be reversed.

2. The negligence charged was the failure to construct and maintain a good, safe and sufficient cattle guard. The defendant, as we have seen, pleaded contributory negligence. To this plaintiff responded by a general denial. The twelfth instruction given by the court was as follows: "If you should

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instruction.

find from the evidence, and under the foregoing instructions, that the plaintiff's intestate, H. P. Ford, was negligent, still defendant could not escape liability, if the act which caused the injury was done by defendant after it discovered said Ford's negligence, if you find from the evidence that defendant could have avoided the injury in the exercise of reasonable care." This instruction is challenged because it is said there was neither pleading nor proof to sustain it. A careful examination of the evidence leads us to the conclusion that there was sufficient to take the case to the jury, provided the question is properly made in the pleadings. It must be remembered that this is not a case where plaintiff must plead and prove freedom from contributory negligence. Such negligence is a defense which the defendant must plead and prove. See 91 Iowa, 179, 59 N. W. 5. When such an issue is tendered, plaintiff may rely upon the denial interposed by law, or he may file a written denial, or he may confess and avoid with or without a denial. *McDermott v. Railway Co.*, 85 Iowa, 180, 52 N. W. 181; *Stanbrough v. Daniels*, 77 Iowa, 561, 42 N. W. 443; *Day v. Insurance Co.*, 75 Iowa, 694, 38 N. W. 113; *Schulte v. Coulthurst (Iowa)*, 62 N. W. 770; *Nichols v. Railway Co. (Iowa)*, 62 N. W. 769. These rules are so elementary that they scarcely need the citation of authorities in their support. But appellee insists that, when contributory

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negligence is pleaded, the rule does not apply; and she relies upon the case of *Crowley v. Railway Co.*, 65 Iowa, 658, 20 N. W. 467, and 22 N. W. 918. That was a case where plaintiff was injured by a moving train negligently run with great force, and at a speed in violation of the ordinances of the city of Cedar Rapids. The plaintiff pleaded freedom from contributory negligence, which the defendant denied. In passing upon an instruction very similar to the one above set forth, the court said: "It is insisted that there is neither averment nor proof that the defendant could have prevented the injury after the discovery of plaintiff's negligence. We do not think such an allegation is necessary to be made in the petition. It is a phase of the rights and obligations of the parties, which arises upon the proof, rather than by pleading. We know of no rule of pleading which requires the plaintiff, in actions of this character, to confess negligence on his part, and avoid it by alleging that the defendant might have averted the injury by using proper care after the discovery of plaintiff's peril." As applied to the facts in that case, this statement of the law is correct. In other words, recovery in such a case is not upon the ground that defendant has been guilty of a second and independent act of negligence, which must be charged as a separate and independent cause of action, but upon the ground that defendant's recklessness and wantonness cannot be excused by plaintiff's contributory negligence. In the case at bar the negligence charged was the failure to maintain a safe and sufficient cattle guard. All that plaintiff needed to do in the first instance was to plead and prove the neglect of the defendant, and the consequent injury. Defendant had the right to plead in defense that the injury was the result of the intestate's contributory negligence, independent negligence, or any other matter or thing which would defeat the plaintiff's action. If plaintiff desired to avoid this defense by any new matter, as that the defendant negligently ran the train upon him after discovering his peril, he should have pleaded it. A plea of contributory

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negligence as a defense to an action under section 1288 of the Code of 1873 is or may be quite different from an allegation in a petition that plaintiff was free from contributory negligence. In the latter case it is "a phase of the rights and obligations of the parties which arises rather upon the proofs than by the pleadings," and it is not necessary for plaintiff to do more than state, in a general way, freedom from contributory negligence. In the former, contributory negligence is purely a defense, which plaintiff should meet by proper averment and proof. Any other rule would require the defendant to meet an issue not tendered by the pleadings, and of which he could not possibly be advised. The case at bar is a good illustration of the rule. The cause of action which the defendant was called upon to meet was failure to construct and maintain a good, safe, and sufficient cattle guard. The defendant pleaded in defense that plaintiff's intestate was guilty of contributory negligence in walking into the guard. Plaintiff denied this. It was practically admitted upon the trial, however, that the deceased did know of the defective guard, and that he walked into it with this knowledge. Whether or not his act in so doing was negligence, was properly submitted to the jury. But the court also gave the instruction now complained of, which related, not to the negligence charged in the petition, but to the negligence of the engineer and trainmen in charge of the train after they knew of the peril deceased was in. Surely, this as not a phase of the negligence charged. Under section 2665 of the Code of 1873, which provides, in substance, that there may be a reply "where some matter is alleged in the answer to which plaintiff claims to have a defense by reason of the existence of some facts which avoids the matter alleged in the answer," it was held in the case of *Hay v. Frazier*, 49 Iowa, 454, that, if plaintiff expects to introduce evidence of matter to avoid the facts pleaded in the answer, he should plead the facts by way of reply. See, also, *Zinch v. Insurance Co.*, 60 Iowa, 266, 14 N. W. 792; *Kervick v.*

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Mitchell, 68 Iowa, 273, 24 N. W. 151, and 26 N. W. 434; Smith v. Griswold, 64 N. W. 624, 95 Iowa, 684; Willits v. Railway Co., 80 Iowa, 531, 45 N. W. 916; Bank v. Wright, 84 Iowa, 728, 48 N. W. 91, and 50 N. W. 23. Appellee contends that the petition charges negligence of defendant's agents and servants after the peril of deceased was discovered. We need not set out the allegation relied upon. It is sufficient to say that, in our judgment, it does not go to the extent claimed. True, it says that plaintiff's intestate "dropped into the cattle guard while he was in such position that he could not see it, with the knowledge of the engineer, fireman, and watchman that he could not see it"; but this is far from charging actual negligence on the part of the defendant's agents after they discovered the peril deceased was in. As there was no issue justifying the giving of the twelfth instruction, it must be held to be erroneous.

3. In the fifth instruction the court said to the jury, in effect, that if plaintiff had proved that the cattle guard was not good, sufficient, and safe, and that H. P. Ford sustained injury and death by reason thereof, then plaintiff was entitled to recover. Complaint is made of this unqualified statement of the law, because it overlooks the defenses of contributory negligence and waiver. The instruction should have had some such qualification. *Hoben v. Railroad Co.*, 20 Iowa, 562. Under the issues as presented, instruction No. 4 asked by the defendant should have been given. It is as follows: "If you find from the evidence that the intestate, H. P. Ford, went between two of the moving cars, at a distance of about seventy-five feet east of the cattle guard in question, for the purpose of pulling a pin to uncouple said cars, and found that the pin which he intended to pull was sticking fast, so that he could not pull it out with his hand, and that he thereupon took the other coupling pin, and attempted to loosen the fastened pin by pounding it, and, while so engaged, continued to walk, between the moving cars, toward the said cattle guard; and if the

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jury further find that said H. P. Ford knew of the location of said cattle guard, and might have avoided it by stepping from between said cars, but failed to do so,—then the said H. P. Ford was guilty of contributory negligence, and your verdict must be for the defendant.” As sustaining this view see *Picart v. Railway Co.*, 82 Iowa, 148, 47 N. W. 1017.

Some other matters are discussed by counsel, but, as they will not arise upon a retrial, they will not be considered. For the errors pointed out the judgment is reversed.

WALKER

v.

ATLANTA & W. P. R. Co.

(*Supreme Court of Georgia, April 1, 1898.*)

Injury to Employee—Defective Track—Chargeable with Notice—Assumption of Risk.*—Relatively to an employee of a railroad company, who, in the performance of his regular daily work for the company, had walked over or near a defective place in the track hundreds of times during a considerable period, and who had thus become fairly chargeable with a knowledge of the existence of the defect, it was not, on the company's part, an act of negligence to allow the same to remain unrepaired.

Same—Negligence—Question for Jury.—If, because of such defect, the employee fell, and was run over and injured by a locomotive, it would be a question for determination by a jury—taking into consideration the nature of the defect, its location, the employee's movements with reference thereto, and all the attendant facts and circumstances—whether or not the fall was due to the negligence of the employee, or was merely the result of misfortune or accident. In determining this question, the jury should also inquire whether or not the employee, in the line of his duty, should have come in contact with the defect at all.

Same.—Under the evidence in the present case, the defective condition of the frog was not imputable to the defendant, as an act of negligence. As, however, there was testimony warranting a finding that the engineer was negligent in failing to stop the locomotive after the plaintiff had fallen, and as the fall undoubtedly con-

*See *Bussey v. Charleston & W. C. R. Co.*, *ante*, and extensive note on assumption of risk from defective appliances.

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tributed to the injury the plaintiff received, the case should have been submitted to the jury, in order that they might pass on all questions of negligence, both as to the plaintiff and the defendant, arising upon the facts proved. It was therefore erroneous to grant a nonsuit.

(Syllabus by the Court.)

ERROR by plaintiff from Atlanta city court.
Reversed.

Glenn & Rountree, for plaintiff in error.

Dorsey, Brewster & Howell, for defendant in error.

LITTLE, J. 1. The plaintiff based his right to recover in the present action on two distinct allegations of negligence on the part of the defendant railroad company, which will be separately considered in the order in which they are made. Case Stated.

The plaintiff first alleged that, as an employee of the defendant, it was his duty, among other things, to take engines attached to trains coming in and going out on trips to and from the car shed in the city of Atlanta, and at crossings between the car shed and shops, and it was also his duty to alight from the engine, and walk a few paces in advance of it, to clear the crossings of people, and to warn passers-by to get out of the way of the approaching train. It is alleged that, on the occasion when the injury now sued for was inflicted upon him, he, while acting in the line of his duty, alighted from an engine at Mitchell street crossing in the city of Atlanta, and walked on the right side of the track, and in advance of the engine six or eight feet, and while walking and looking straight ahead, warning passers-by to get out of the way of the approaching engine, and while in the performance of his duty, flagging said train over the street crossing, his feet struck against a frog which projected $1\frac{1}{4}$ inches above the main line of track, so that he stumbled and fell, and while trying to catch and keep from falling the pilot of the advancing engine caught his left leg, on the right side of the engine, and threw him over, lengthwise, on the pilot, and he was jerked to the ground, and both feet fell under the pilot.

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Plaintiff managed to get one of his feet out from under the pilot, but the wheel caught and rolled over his left leg, cutting his foot off, and otherwise injuring him as set out in the petition. It was alleged that this injury was caused by the negligence of the defendant in having and allowing the frog over which plaintiff stumbled to project above the main track as above stated. On the trial the plaintiff testified, among other things, that the frog over which he stumbled, and which projected above the main track, should have been on a level with the latter. He further testified that he had been working in the yards, of which this crossing formed a part, eight or nine years in different ways; that he had passed over Mitchell street crossing two or three times a day every day for a period of nearly two years, and over this identical frog; that he used that switch and frog every time he came out with the engine,—two or three times a day; that the frog belonged to the track the switch was on, and over which the engine plaintiff was accustomed to precede across the street had to pass. Assuming that the grounds of trackway over which the plaintiff, in the discharge of his duties, had to pass, were defective in the respect indicated, the question to be determined is whether the railway company, in allowing the grounds or trackway to remain in such defective or dangerous condition, was chargeable with negligence, by reason thereof, relatively to the plaintiff. We recognize the rule that the employer is bound to exercise ordinary care in furnishing its employees reasonably safe machinery and appliances with which to work; that he is also bound to exercise ordinary care to provide a reasonably safe working place, and that this rule applies to switch yards, or yards where trains are made up; and that employees whose duties require them to perform service in the yards of the company are entitled to the protection afforded by the rule; and we come at once to consider whether, under the facts of this case, the plaintiff was entitled to recover for the injury sustained by reason of the alleged negligence of the

defendant in failing to remedy the defective or dangerous condition of the track over which the plaintiff was required to pass in the discharge of his duties, according to the allegations of the petition. As a limitation upon the right of an employee to recover for injuries resulting from defective machinery, appliances, or working grounds or places, it is well settled that no recovery can be had for defects of which such employee has knowledge, and that he must exercise ordinary care and caution in detecting such defects ; and hence the establishment of the rule that the servant not only assumes all risks ordinarily incident to the business in which he is engaged, but also all other open and visible risks, whether usually incident to the business or not. The servant is bound to see patent and obvious defects in appliances furnished him, and dangerous conditions of the premises upon which he is to work, which are open and visible. He must himself assume the risks and hazards which are open to observation, and is bound, to a certain extent, at least, to exercise his own skill and judgment in discovering defects not concealed, and in preventing injuries which may arise therefrom. He cannot blindly rely upon the care and skill of his master. The servant is presumed to know of defects which are obvious, and is chargeable with knowledge of such defects, and this knowledge may be inferred from evidence of his familiarity with the working place or grounds upon which he is required to work. In the present case the defect of which the plaintiff complains was one which would have been apparent to him upon casual inspection ; his opportunities for knowing the dangers which the existence of this defect created, as incident to his service, were better than those of the defendant, by reason of his constantly passing over the alleged defective frog, and his general familiarity with the yard ; and we are of the opinion that, relatively to the plaintiff, it was not on the defendant's part, an act of negligence to allow the defective frog to remain unrepaired.

2. As we have said, the servant is under a duty to

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be reasonably observant of the machinery he operates, and to exercise reasonable care in examining his footings and surroundings in and about the premises upon which he is to work, and otherwise to use ordinary care to avoid injuries to himself. Whether, where an employee, after having knowledge of defects in machinery, or those which may exist on the premises, or being chargeable with such knowledge, continues to work with or upon the same, without reporting such defects to the master, or making any effort to repair the same, or otherwise seeking to shield himself from dangers attendant upon the existence of such defects, is guilty of negligence, is a question to be determined by the inquiry whether a person of ordinary prudence would have believed the defects dangerous to, or increased the risks of, the service in which he was engaged. If such a defect, in its relation to the service being performed, is not of such a character as to produce harmful results, which might by reasonable and careful foresight have been anticipated, no negligence can be attributed to the servant. If the injury resulting from such defect was of an unusual character, against which ordinary care and prudence on the part of the servant could not have protected him, such injury, with respect to the servant, would be a mere casualty or accident. Whether in the present case the plaintiff was chargeable with negligence in pursuing his duties while the alleged defect existed in the yards over which he had to pass, without discovering and reporting the same to the defendant, or otherwise taking precautions to shield himself from any dangers incident thereto, is a question of fact, which the jury, after taking into consideration the nature of the defect, its location, the plaintiff's movements with reference thereto, his familiarity with the premises, and all the attendant facts and circumstances, must determine. It was contended by the defendant in error, that, assuming that the frog was defective, the plaintiff would not be entitled to recover, because, as insisted by the defendant, he occupied voluntarily a

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place of danger in performing his duties, when he could have occupied a place of safety, where the duties could have been as well discharged. This contention is predicated upon the testimony of the plaintiff himself that the frog over which he stumbled was probably less than a foot from the right-hand rail of the track on which the engine he piloted was moving, and the further testimony of the plaintiff that, if he had walked two feet to the right of the rail on the right side, he would have escaped the frog and the ends of the cross-ties, and any part of the engine, had he stopped suddenly; the plaintiff testifying that the engine, in passing over the track opposite the frog, would extend out over the latter about two feet. It was contended that, by occupying a position of at least two feet to the right of the track, the plaintiff could have discharged his duties equally as well, and at the same time been out of all danger. The principle is well established that if a servant voluntarily, and with no emergency upon him, select a dangerous way to perform a duty, when there is a safe way, knowing the way thus selected to be dangerous, or if the danger is apparent or obvious, then he assumes the risk, and would be guilty of contributory negligence. The mere fact that the party was injured because of the way selected, when, if he had selected the other way, the injury would have been avoided, alone, does not fix upon him contributory negligence. The result is not the true test. Under the facts of the present case, it was a question Same—Negligence
Question for Jury. for the jury whether there was a safer way to discharge the duty than that selected by the plaintiff, and whether the way actually selected by the plaintiff was one which, to a person exercising ordinary care and prudence in the discharge of duty, would have been obviously more dangerous. It was incumbent on the plaintiff to exercise ordinary care while engaged in the line of his duty, and whether such care was exercised by him in selecting the position relatively to the track and moving engine which he did adopt for the performance of the duty imposed upon

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him is a question which should be settled by the jury.

3. Holding as we do that the defective condition of the frog was not imputable to the defendant

as an act of negligence, we now come
same.

to consider the second count of negligence upon which the plaintiff relied for a recovery, which is, in substance, that at the time the injury was inflicted the engine was running at a speed of not more than a mile or a mile and a half per hour, and could easily have been stopped by the engineer after plaintiff fell, and before the engine reached him, but that the engineer made no effort to stop the engine, and at the time plaintiff fell was looking back behind him, towards the rear of his engine or train, and did not see that plaintiff had fallen until the engine had knocked him down, and attention was then called to the position of the plaintiff by some passer-by shouting to the engineer, calling his attention to the fact. On this point there was testimony that the plaintiff fell on the right side of the engine; that the engineer was situated in the right side of the cab of the engine, and that there was nothing to obstruct his view of the plaintiff at the time of the fall; that plaintiff cried out as soon as he was caught by the pilot of the engine; that the engine was moving very slowly,—not more than one or two miles an hour; that it could have been stopped within a distance of 12 inches by the application of the brakes; that after he fell a bystander ran a distance of 24 feet, and succeeded in pulling one of his feet out, but that the other was caught by the front wheel of the engine and cut off; that the wheel passed over his foot or leg at a point about 10 or 11 feet distant from the frog over which he stumbled. Another witness testified that after plaintiff cried to the engineer the latter put on air brakes and threw up his hands; that witness thought plaintiff had been run over when this was done, because the engine stopped immediately. If it be true that the engineer was negligent in failing to be on the lookout for the plaintiff, and in failing to stop the engine in time to prevent

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the injury,—which is a question of fact to be determined by the jury,—it becomes material to inquire whether the plaintiff was himself chargeable with any negligence which contributed to the injury sustained by him. If he was, he would not be entitled to recover, though it might appear that the engineer, in the exercise of ordinary care, might have discovered the plaintiff's perilous position in time to have averted the injury. With reference to injuries inflicted by railroad companies, it is provided by section 2323 of the Civil Code that "if the person injured is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery." Under this provision of the Code, it has been ruled that the doctrine of contributory negligence does not apply to the case of an injury sustained by an employee, so as to permit him to recover, and diminish the amount of the recovery in proportion to the fault attributable to him, but that in order to recover the employee must himself be free from fault, and, if the injury is sustained by him in consequence of any fault or negligence on his part, he cannot recover. *Railroad Co. v. Maloy*, 77 Ga. 237, 2 S. E. 941. In construing the words "without fault," as employed in the Code section referred to, this court, in the case of *Railroad Co. v. Lanier*, 83 Ga. 587, 10 S. E. 279, held their meaning to be that "the party suing must not have done anything to contribute to his injury, or must have done everything to prevent the consequences of the company's negligence." In the case of *Railway Co. v. Barber*, 71 Ga. 644, it was held that in order for a railroad employee to recover from the company for a physical injury to him, done in the business in which he was engaged, he must be blameless about the business which caused the injury. While it is well settled that, if the negligence or carelessness of the employee does not contribute to the injury (as, for instance, where he is at fault about something wholly disconnected with the transaction, or was at

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the time at fault about a matter that had nothing to do with the catastrophe), a recovery on the part of the employee will not be debarred thereby (Railroad Co. v. Mitchell, 63 Ga. 173; Railway Co. v. Barber, 71 Ga. 644, *supra*), yet it is equally as well settled that if the employee, immediately or remotely, directly or indirectly, caused the injury, or any part of it, or contributed to it at all, he is not entitled to recover (Prather v. Railroad Co., 80 Ga. 427, 9 S. E. 530). And in the case of Railroad Co. v. Hicks, 95 Ga. 301, 22 S. E. 613, it was ruled that "negligence of the plaintiff [an employee], however slight, which contributes in an appreciable degree to the cause of the injury, defeats a recovery." In view of these authorities, if it should be determined that, under the rules laid down in the second paragraph of this opinion, the plaintiff was negligent in pursuing his line of duty, either because of the defective condition of the frog, or in selecting the particular way of footing adopted by him in the discharge of the duty (that is to say, if the jury should determine that there was a safe way which should have been apparent to the employee, in which he could have discharged the duty, and that the way selected by him was dangerous, and that the danger was, or ought to have been, apparent to him), then we think the plaintiff, notwithstanding the engineer may have been negligent, would not be entitled to recover, because, under the facts of the case as they appear in the record, no other conclusion can be reached, except that the fall contributed proximately to the injury. The fall was concurrent, simultaneous, and connected with the alleged act of negligence on the part of the engineer. It was so far an efficient cause of the injury that without it the injury would not have happened. If the employee was not negligent in either of the respects pointed out in this opinion, but it should be determined by the jury that the fall was a mere accident, and it should further appear that the engineer was negligent in failing to stop the engine in time to prevent the injury after the fall occurred, then the defendant would

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be liable. We think the court committed error in granting a nonsuit, as, under the view here expressed, the case should have been submitted to the jury, in order that they might pass on all questions of negligence, both as to the plaintiff and the defendant, arising upon the facts proved. Judgment reversed. All the justices concurring, except COBB, J., absent for providential cause.

VALLEY RY. CO.

v.

KEEGAN.

(Circuit Court of Appeals, Sixth Circuit, April 5, 1898.)

Injury to Employee—Defective Roadbed—Evidence.—In an action by an employee against the railroad for injuries resulting from defendant's alleged negligence in failing to properly plank between its rails where they crossed the side walk of a public street, it was not reversible error to admit evidence of the condition upon which the company had acquired its street rights, it having been a question for the jury to say whether the space in which plaintiff's foot was caught was a dangerous defect in the roadbed.

Same—Question for Jury.—It would have been error to assume that such space was one of original construction, or was of the same character as the spaces in all other planks between curved rails, the evidence on such point having been conflicting.

Same—Same.—Though such space had existed for not less than two months, and plaintiff had, during that time been constantly employed in the yard, it cannot be said as a matter of law that he was chargeable with notice of it, the yard being about a mile in length, and containing 22 tracks.

Same—Same—Obvious Defects.—The evidence as to whether the existence of such dangerous space was so obvious as to render plaintiff chargeable with notice thereof having been conflicting, the question was properly submitted to the jury.

Same—Assumption of Risks.*—Before a court is authorized to presume, as matter of law, that an employee accepts the dangers incident to a defective roadbed, it must appear that he accepted employment with actual knowledge of the defect and its dangers, or that he continued in the service after he knew, or was chargeable with notice of the danger.

*See *Bussey v. Charleston & W. C. R. Co.*, *ante*, and extensive note on assumption of risk from defective appliances, etc.

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ERROR by defendant to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio. *Affirmed.*

This is an action of tort for personal injuries sustained by the defendant in error while in the employment of the plaintiffs in error as receivers for the Valley Railway Company. At the trial it appeared that the defendant in error, William J. Keegan, was a brakeman, and as such was a member of a switching crew employed in the yard of the railway company at Cleveland, Ohio. While engaged in making a coupling, his foot was caught in a hole between the rails, and before he could extricate himself he was knocked down and run over. Keegan had been employed in the yard of the railway company in different capacities for several years before this injury. The yard of the company was very extensive, having a length of about six miles, and was occupied by several hundred tracks, including spurs, switches, and dock tracks. For some two months prior to this accident he had been a brakeman for a switching crew employed at a particular part of the general yard, called the "Island Yard," though this also was quite extensive and contained about 22 tracks, great and small. Two of the principal of these "Island Yard" tracks occupied portions of a public street called "West River Street." The injury to Keegan occurred where these tracks crossed the sidewalk of the street. At this crossing, and in the street, the tracks were planked between the rails. Just at the outer side of the sidewalk there was a space between this planking and the rail of between three and three-quarter and four inches in width at its widest part and a depth of seven inches. Keegan's business was to make all couplings which fell to his crew. He was at this time engaged in coupling a stationary car which stood just at the edge of the sidewalk to some cars which had been started by gravity towards the standing car, and were approaching at a speed of about two miles per hour. The evidence tended to show that there was a link and pin in each of

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these opposing drawheads. Finding the pin fast in the stationary car, he walked towards the moving car, removed the link and set the pin, and then undertook to step out from between the cars, intending to guide the link of the stationary car from the outside. As he stepped to one side, his foot was caught in the space between the planking and rail so tightly that with his utmost exertion he could not remove it before it was run over and crushed.

At the conclusion of all the evidence the plaintiffs in error requested the court to instruct the jury to find for the defendant. This was refused. They also preferred a number of other requests. Among them were two numbered 10 and 11, which were refused. These requests involved the principal question upon which the case must turn, and are as follows :

“(10) Defendants further request the court to instruct the jury that if they shall find that the plaintiff was employed as brakeman by the defendants, and as such brakeman charged with the duty of coupling and uncoupling cars at the time he was injured; that he had been engaged in service of the defendants and the Valley Railway Company, in the yards of said company in the city of Cleveland, as brakeman or conductor, for three years prior to the accident, and in the yard where the accident happened for two months immediately preceding said accident; that during said two months the space between the planking and the rails in said yard was not blocked; that the planking of which the plaintiff complains was, during said time, in the same condition and position as at the time of the injury; that during said two months the plaintiff frequently passed over and along the place where he was injured; that the condition and position of the planking was plainly visible, and the space between it and the rail in plain sight,—he will be conclusively presumed to have had knowledge of the condition of said track and planking, and must be held to have assumed the dangers and risks incident to the use thereof.

“(11) Defendants further request the court to instruct the jury that the plaintiff assumed all the risks and

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dangers incident to the business of the defendants which were obvious and apparent, or of which he was advised, or of which in the exercise of ordinary care on his part he might have known, and if the plaintiff continued in the employment of the defendant with the knowledge or with the reasonable opportunity of knowing that the defendants had not blocked the space between the planking and the rails, and that the plank in question was from three and one-half to four inches removed from the rail next adjacent thereto, and that it was warped, rotten, or out of repair, he assumed the risks attendant upon the use of such planking and track, and cannot recover in this action."

There was a jury, who found a verdict for Keegan, and the receivers have sued out this writ of error from the judgment thereon.

Kline, Carr, Tolles & Goff, for plaintiffs in error.
Meyer & Mooney, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

While there is no general duty to plank between the rails, yet this railway company accepted its street rights on condition that it would plank between its rails those portions of the public streets used

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by it. This duty was undoubtedly imposed for the benefit of the public, who had an equal right to the use of the street.

Nevertheless, if the railway company undertook to plank between the rails, it was under a duty to so put down the plank, and so maintain them when down, as that they should be reasonably safe to its employees who might be required to work thereon. This action is not for a failure to put down planking, but is for original negligence in construction or negligent maintenance when down. The company may have been under no obligation to its employees by reason of its con-

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tract with the city of Cleveland for failing to plank as required by that contract. But it was under obligation, if it did plank between its rails at street crossings, to so do the work and so maintain it when down as that it should be reasonably safe to its employees who might be required to pass over it in the discharge of their duties, provided they themselves were in the exercise of due care. It was a question for the jury, under the facts in evidence, to say whether the hole in which the foot of defendant in error was caught was a dangerous defect in the roadbed. *Hannah v. Railroad Co.*, 154 Mass. 529, 28 N. E. 682. It was not reversible error, therefore, to admit evidence of the condition upon which the company had acquired its street rights.

Was the hole in which Keegan's foot was caught such an obviously dangerous defect in the roadbed as that, in view of Keegan's long employment in this yard, the court should have directed a verdict against him or given the special instructions asked by plaintiff in error which have been set out in the statement of the case? The learned trial judge who heard all of the evidence, and who has had much experience in such trials, was not satisfied that this question should be taken from the jury. After speaking of the duty of the railway company towards the public who might use the street occupied or crossed by the company's tracks, he instructed the jury as follows:

"As to the employees of the defendant company, it did owe the same duty as to the public. As to the employees, even if you find the original construction was not reasonably safe, or, as maintained at the time of the accident, if you find it was not reasonably safe, yet if you further find that the employee knew of such defective or dangerous condition, or if you find the condition was obvious and patent, and could have been seen by the employee by the exercise of ordinary care, or that the employee, by the exercise of ordinary care, should have known of it, and, notwithstanding such knowledge or opportunity for knowledge, still continued in the service of the defendant, then he assumed

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the risk of an accident from such defective condition, and cannot recover. It becomes, therefore, important for you to determine whether or not this was such an obvious defect as the plaintiff ought to have observed. In determining this question, you will look to how patent and open it was; how easily it could be seen; what opportunities the plaintiff had for seeing it; how long he served in the yard or in the neighborhood of the yard; under what circumstances he passed over the place; whether he passed over and around and about this crossing; when he had opportunities for observing it; or when he should have observed it, knowing how often his work would bring him there; or whether he was only about it when in the performance of his duty; and whether that duty was of such a character as to make it unlikely that he would have a chance to notice this obvious defect. All these are facts which you must consider in determining whether or not this was an obvious and patent defect, of which the plaintiff had notice, or of which he ought to have had notice by the exercise of ordinary care. And in this same connection you will remember that it is claimed that the proof shows that upon all the curves on these switches in and about this yard the defendant laid a straight-edged plank near the rail, so that, while the ends of the plank were from two to two and one-half inches from the inside of the rail, the center of the plank was three and one-half to four inches from the inside of the rail. This is an important fact for you to consider in determining whether or not the plaintiff knew or ought to have known of this obvious defect, because if all the planks were laid in that way, and that was the defendant's standard of construction, then there is all the more reason why the plaintiff ought to have had knowledge of that fact. If it was only one plank that was laid that way, he might not be expected to observe that particular place and location; but if all the planks were laid that way, and he knew it, then there was the more reason why he should have known of this particular defect, and have been on his guard. If you find from the proof

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that the defendant did not lay this plank in a manner to make it reasonably safe for employees, and that such defect was not an obvious one, and the plaintiff did not know of it, or by the exercise of ordinary care could not have known of it, then the defendant will be liable, and you should find a verdict for the plaintiff. But even if you find that the plank was not laid so as to be reasonably safe, but yet further find that the plaintiff knew of that fact, or by the exercise of such care as I have described ought to have known of it, and notwithstanding that defect continued in the service of the defendant, then he cannot recover. Or, if you find that the defendant did not lay this plank so as to make it reasonably safe, and yet further find that the plaintiff in coupling said car did not exercise the care that a prudent man would do under the circumstances,—that is, that he did not look where he was stepping,—and that the want of such care was the proximate cause of the injury, so that he thereby contributed to his injury, then the plaintiff cannot recover."

We have given careful attention to the facts which relate to this branch of the defense, and have reached the conclusion that there was no error in refusing to direct a verdict, and none in declining the instructions asked as to the obviousness of the defect in the roadbed which was the occasion of Keegan's hurt. The circumstances were such as to make the question one proper for the jury, and the charge on this subject was a clear and full exposition of the law, and quite as favorable as the plaintiff in error was entitled to have.

The argument in favor of the contention that the hole in which Keegan's foot was caught was an obviously dangerous defect has chiefly been rested upon the claim that it was not an unusual or isolated space, but such a one as existed at all of the curves in the yard, and was a fault, if any, in original construction, due to the placing of straight-edged planking between curved rails, causing thereby a wider space between the plank and the rail at the center of the plank than at its ends. Of course if such spaces existed at the center of all planks

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laid between curved rails in this yard, the obviousness of the existence of such spaces, and their dangerous character to employees compelled to pass frequently over them, would be much more maintainable than if this particular hole was an unusual and an isolated instance. The trial judge gave attention to this fact, and instructed the jury that, if all planks at curves were laid as this one and exhibited same width of space, there would be much greater reason for charging the plaintiff, Keegan, with knowledge of the fact. There was, at least, a conflict of evidence as to the origin of the space into which Keegan fell, and as to its correspondence in character with other spaces due to planking between curved rails. There was no witness who undertook to compare this space in width or depth with other spaces in the yard. There was evidence that the flange of the wheels required a space between the planks and the rail of $2\frac{1}{2}$ inches, and that the spaces thus left in the yard had never been blocked. The evidence as to the width of the space in which Keegan's foot was caught was conflicting. Some witnesses, who took no measurements, estimated it at 3 inches in width at the place of the accident. Others who did measure it, in one way or another, stated it to be $3\frac{1}{2}$ inches, while still others found it $3\frac{3}{8}$ and 4 inches. There was no measurement of spaces in other localities. Several servants of the company, testifying for it, stated that they had not noticed the width of this particular space until after Keegan was hurt. The section foreman, in charge of repairs and maintenance of track and roadbed in this yard, and the witnesses who testified that all planks at curves were laid straight-edged, and not cut to correspond with curvature of the rail, said they had not known the width of this space until they examined it after the accident. Witnesses for the defendant in error testified that this plank was warped; some said it had "humped" in the middle. One or more said it was decayed and loose, the spikes having pulled out. In this conflicting state of the evidence, it would have been

Same - Question
for Jury.

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error to assume that the space in question was one of original construction, or was of the same character as the spaces in all other planks between curved rails. The jury might on the evidence infer that this was a wider space than usual, even at other curves, and was the result of warping or decay, though the weight of evidence seems to be that the plank was sound and tightly spiked.

The evidence tended to show that this dangerous space had existed for not less than two months, and that during that time Keegan had been constantly employed in the part of the yard called the "Island Yard," and that his duties had called him to pass over alongside of this defective roadbed many times each day for the preceding two or three months. But this "Island Yard" was about a mile in length, and contained 22 tracks, long and short, though the greater part of his work was done on the defective roadbed. Keegan's duties were to couple for his crew. In this work he was called from one part of this yard to another. He rode as often as he walked, and when on the ground was there for the purpose of making a coupling, a duty which required active work and great attention. He says that he had not noticed this space. No one says he had. The circumstances of his employment were such that we cannot say that he was inexcusably ignorant of the dangerous character of this space.

That unblocked spaces existed between the rails and planked portions of the track was something so long existing and so general in this yard that he may well be held to have notice of that fact. But a space of $2\frac{1}{2}$ inches was not an obvious danger. It was not a danger at all. A space of 3 inches was almost equally unlikely to be a source of danger. But a space of 4 inches was a trap into which most feet might fall. Whether this space was wide enough to be obviously dangerous to persons whose occupation required them to frequently pass it would depend much more upon the

Same—Same.

Same—Same—
Obvious
Defects.

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closeness with which it was observed and the accuracy of the eye in estimating its width. The actual test of measurement was in more than one instance a surprise to witnesses who estimated its width by the eye. This was notably the case with John White and W. W. Plummer, witnesses for the plaintiff in error. Others, notably witnesses for the defendant in error, had from mere testimony of the eye regarded it as a dangerous space. On a matter so easily determined as the relative height of the planking and top of the rail, there was a wide difference of statement. Witnesses on both sides said the plank at the point where Keegan was hurt was from one-half to one inch higher than the top of the rail. Others for the plaintiffs in error said it was about an inch below the top of the rail. As the rail was shown to be four inches in thickness, and the planking not over three inches, and both spiked to the ties, it is clear that either these witnesses were bad judges of such slight differences, or that this particular plank had "humped," and was warped, as claimed for defendant in error. The circumstances clearly make a case in which the evidence is so in conflict upon matters of fact important in determining whether the existence of a dangerous space was so obvious as to make Keegan's ignorance inexcusable as to require its submission to a jury.

The case of *Gleason v. Railroad Co.*, 159 Mass. 68, 34 N. E. 79, has many features in common

with this case, and therefore has been
Same—Assump-
tion of Risk. much relied upon by plaintiffs in error.

But in that case there was no conflict as to the facts from which knowledge was to be presumed. The exception assumed the existence of a space of three and one-half inches in the planking of a track in a yard over a waterway, at the time of Gleason's employment. This space was near a switch which was tended by Gleason in a yard only 500 feet long and 40 feet wide. On these admitted facts, Gleason was presumed to have accepted the risk. The case is possibly an extreme one. To reverse in this case

Judd's Adm'x v. C. & O. Ry. Co

would require us to go even beyond that ruling. On this record we could not justifiably assume the existence of this hole when Keegan accepted employment. Knowledge of the existence of such a hole in the roadway might be presumed as matter of law from employment in a yard 500 feet long and 40 feet wide, which would be unjustifiable in a yard a mile long and containing 22 tracks. Neither do we think that cases are controlling which turn upon the circumstances under which an employee will be held to have accepted the risk from unblocked frogs or switches. Questions of this kind must mainly turn upon the facts of a particular record. Before a court is authorized to presume, as matter of law, that an employee accepts the dangers incident to defective machinery or roadbed, it must appear that he accepted employment with actual knowledge of such defect and its dangers, or that he continued in the service after he acquired knowledge, or by due care and reasonable attention might have known of the danger. To justify a presumption of knowledge, the defect must be obvious and its danger equally plain to one at all attentive. The facts here do not make a case where the court could justifiably say that Keegan's ignorance of the dangerous character of this space in the roadbed was unjustifiable in law and his acceptance of the risk presumed.

Other matters have been presented by the assignment of errors. They have received attention. None of them are well taken. The judgment must be affirmed.

JUDD'S ADM'X

v.

CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky, Feb. 2, 1897.)

Death of Employee—Knowledge of Defects—Burden of Proof.*—
In a statutory action against a railroad company for the negligent

*See *Bussey v. Charleston, & W. C. Ry. Co.*, *ante*, and *note*.

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killing of an employee plaintiff need not prove decedent was not aware of defects in machinery, which were alleged to have been the proximate cause of the accident, nor that he was not chargeable with notice of them.

Same—Question for Jury.—It was for the jury to determine whether or not decedent was aware of such defects.

PER CURIAM. The case of *Bogenschutz v. Smith*, reported in 84 Ky. 330, 1 S. W. 578, was an action by the servant against the master to recover for injuries received, as alleged, by the negligence of the master, as by his failure to furnish safe or suitable apparatus or machinery for the use of the servant in the discharge of his duty, or, if such machinery or appliances were ever furnished, that they had become defective. The servant's right to recover was under the common law, and he was required to make out his case according to the rules of the common law. The case at bar is purely a statutory right, not existing under the common law; hence the case in 84 Ky. 330, 1 S. W. 578, is not like the case under consideration, and the decision in this case is not in conflict with the one relied on by appellee, even if it be conceded that the latter case announces the rule contended for by appellee. The adoption of the rule contended for by appellee would practically nullify the statute, for it would be impossible to prove that the decedent was not aware of defects, and could not have known thereof by the exercise of ordinary diligence, as, at any rate, such proof could rarely, if ever, be made. There is nothing in the statute to sustain the contention of appellee.

Same—Question for Jury.

The question as to whether the decedent knew of the defective machinery was a question for the jury, and not for the court. Petition overruled.

**Death of Employee
—Knowledge of
Defects—Burden
of Proof.**

McGhee v. Bell

McGHEE *et al.*

v.

BELL.

(*Court of Appeals of Kentucky, Jan. 22, 1897.*)

Employees Using Appliances When Aware of Defects—Assumption of Risk.*—Plaintiff, a section hand, while operating a hand-car under the orders of his foreman, was injured by a fall resulting from the breakage of the lever handle, which he knew was made of decayed wood and was afraid to use; and the foreman was also aware of the defect. *Held*, that a verdict for plaintiff was sustained by the evidence, it having been the duty of the company to furnish safe appliances to be used by its employees; and the fact that plaintiff knew of the defect was immaterial, the evidence showing that he knew that the lever handle had been used in the same condition for several days preceding the accident, and that he did not fully appreciate the risk of using it.

APPEAL by defendant from Fayette county circuit court. *Affirmed.*

Thornton & Kerr, for appellants.

George Denny, Jr., and *Nelms, Yost & Power*, for appellee.

LEWIS, C. J. While appellee, employed by appellants as section hand, was, in obedience to the order of the section foreman, operating, with others, a hand car, the handle or lever broke, and he, in consequence thereof, fell backward upon the railroad track, was run over by the car, and severely injured. He alleges in his petition, and proves the defective condition of the lever handle was known to the foreman, for it was made by his direction, by one of the hands, of timber that was in the language of the witnesses, "doted and worm-eaten." But, even if it had not been actually known to him, it was the duty of the foreman to ascertain and know that the handle was unfit, and the use

*See *Bussey v. Charleston & W. C. Ry. Co.*, *ante*, and *note*.

McGhee v. Bell

of it was dangerous. It is also alleged in the petition that he (appellee) did not know of the decayed and defective condition of the handle. The lower court distinctly instructed the jury that if, at the time appellee was working with said lever, he knew, or by ordinary observation could have known, it was decayed or weak, and by reason of such decay or weakness was likely to break in using it, they should find for defendant (appellant). Nevertheless, appellee himself testified, on the trial, as a witness, that the "lever handle was made out of doty wood, worm-eaten, and wasn't any good. We were all afraid of it from the start." And thus arises a very serious question whether the verdict of the jury ought not to have been by the lower court set aside because flagrantly against the evidence.

The recognized rule is that the employer is bound to furnish the servant with proper and safe material and implements with which to do the required work; and if he knows, or by exercise of ordinary care and vigilance could have known, them not to be such, and by reason of negligence in that respect the servant is injured, the latter is entitled to recover damages therefor. But when the employee knows all about the material or implements furnished, and, being fully aware of its defective and unsafe condition, voluntarily uses it, and thereby sustains an injury, he is without remedy. An obligation rests upon the employee to know that he has sufficient skill to know and to exercise ordinary vigilance to ascertain whether material or implements furnished by the employer are sound and safe. But the employee is not required to use any vigilance or care in inquiring about or testing the suitability and safety of materials and implements furnished, but has the right, and it is his duty, to look to and depend upon the employer in that respect; and it is only when being fully aware of the defective and unsafe condition of such material, he voluntarily uses them, that he is without remedy for an injury resulting to himself therefrom. The time appellee was ordered by the foreman to go upon the hand car and work the lever was after

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the close of the day's work, and the place was about four miles from where they all rested at night. The lever handle had been used without accident to any of the hands for several days, and it does not seem to us, therefore, that this is a case where the employee was, in the meaning of the rule, fully aware of the defective and unsafe condition of the material or implement, or, appreciating and knowing the danger, voluntarily used it. But the section foreman should be held to either have actually known, or have used ordinary diligence to know, the handle that he furnished and ordered appellee to use at a time and place where he was constrained to do so, was defective and unsafe. As, therefore, the fact testified to by appellee does not, in our opinion, deprive appellee of his remedy for the injury done, and he showed a cause of action in all other respects, the judgment is affirmed.

FORDYCE *et al.*

v.

EDWARDS.

(Supreme Court of Arkansas, March 5, 1898.)

Injury to Engineer—Defective Appliances—Instructions.—In an action against a railroad company by a locomotive engineer for injuries sustained through the alleged negligence of the company in furnishing him with a defective engine, it was reversible error to instruct that plaintiff was not required to take notice of latent defects, it having been previously decided on appeal that the defects complained of were patent defects.

Same—Assumption of Risk.*—Patent defects in an engine should be discovered by the engineer before starting on a trip; and if he runs it in such condition he assumes the risks incident to such conduct; and the fact that he did not discover such defects until after he had started on the trip would not change the rule; and a misleading instruction on this point was not cured by other correct instructions of which the erroneous instruction was the basis.

*See *Bussey v. Charleston & W. C. Ry. Co.*, *ante*, and *note*.

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Evidence—Opinions.—The opinions of witnesses as to the conduct of a prudent man under certain circumstances were not admissible.

Inspection of Engines—Due Care—Question for Jury.—It was a question for the jury whether or not plaintiff should have discovered a defect in the pilot before starting when it appeared from the evidence that the engine was standing at the time in a depression.

APPEAL by defendants from Jefferson county circuit court. *Reversed and remanded.*

Sam H. West and J. M. & J. G. Taylor, for appellants.

N. T. White, H. King White, and W. T. Wooldridge, for appellee.

HUGHES, J. This is an appeal from a judgment for appellee in the sum of \$5,000, against the appellants. The case was appealed once before, and was reversed and remanded for a new trial. The opinion

Case Stated.

is reported in 60 Ark. 438, and 30 S. W. 758. The appellee was a locomotive engineer in the employment of appellants, and was injured by the derailment of the engine, caused by striking a horse. He alleged in his complaint that his injury was caused by the negligence of the appellants in furnishing him with a locomotive the pilot of which was raised so high above the track that the locomotive was dangerous to operate. This was held on the first consideration here to be a patent defect, to observe which the appellee was required by law to use ordinary care. On the first trial, the circuit court, at the request of the appellee, gave the jury the following instruction, numbered 2: "The plaintiff had the right to presume that the

Injury to Engineer—Defective Appliances—Instructions.

engine furnished by the defendant was in good condition, and he was not required to inspect the same for defects; and if the jury find from the evidence that, during the course of the trip, he discovered that, owing to the use of an improper spring under the locomotive, the same had become more dangerous, then, by remaining in the performance of his duties, he did not assume the increased risk occasioned by such defect, unless the jury believe from the evidence that the increased

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risk was so hazardous that a reasonably prudent man situated as the plaintiff was would not have continued in the performance of his duties." This court held on the first appeal that the first part of this instruction was erroneous, in that it, in effect, told the jury that the plaintiff was not required to take notice of obvious defects; while the law required that he should have used his eyes, and have made such inspection as ordinary care requires of one whose duty it is to take notice of obvious defects. It is, of course, well settled that a plaintiff in the situation of the appellee is bound to use ordinary care to observe patent defects in machinery he is operating; and if he fails to do so, and is injured by an accident resulting from such defects, he cannot recover damages for his injury, for he assumes the risk. See authorities cited in 60 Ark. 442, 30 S. W. 758. On the second trial of this cause the circuit court gave this same instruction numbered 2, with an amendment to make it read that the plaintiff was not required to inspect the engine for latent defects. This interpolation of the word "latent" before the word "defects" was clearly erroneous, because the court had decided the defect complained of was patent, and there was no question of a latent defect in the case. It might be argued that other instructions given cured this error; but, while there are others that militate against the idea couched in this one, we yet think it was erroneous, and calculated to confuse and mislead the jury; and for this cause, if there were no other errors, the case should be reversed. But this instruction is clearly obnoxious to further objection. The second instruction told the jury that "if the jury find from the evidence that, during the course of his trip, he discovered that, owing to the use of an improper spring under the locomotive, the same had become dangerous, then, by remaining in the performance of his duties, he did not assume the increased risk occasioned by such defect, unless the jury believe from the evidence that the increased risk was so hazardous that a reasonably prudent man, situ-

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of Risk.

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ated as the plaintiff was, would not have continued in the performance of his duties." This leaves out of consideration the question whether the appellee used ordinary care to discover the defect complained of, before starting on his trip, and authorizes them to find for the plaintiff if he discovered the defect after he had started on his trip, provided the danger therefrom was not so great as that a reasonably prudent man, situated as the plaintiff was, would not have continued in the performance of his duties; and this, notwithstanding there was a patent defect, which the plaintiff ought to have discovered before starting on his trip, and which was the same, he says, he discovered only a short time before the accident which occasioned the injury complained of. The defect was patent, and he, under ordinary circumstances, ought to have discovered it before starting on his trip; and, if he did not, he assumed the risk incident to the operation of the engine in that condition, and the fact that he discovered it afterwards would not alter the case. This second instruction was the basis for the third, fourth, and fifth for plaintiff. It is easy to see how this might have misled the jury. In the third, fourth, and fifth instructions given at the request of the defendant the court correctly charged the law as to the duty of the plaintiff to use ordinary care to discover this patent defect. But these did not explain or cure the error in the second instruction to which we have adverted.

In the trial, the plaintiff introduced, over the objection of the defendant, to which he excepted, evidence to show that the reason why he could not discover the defect complained of was that, at the time he took charge of the engine, it was standing in a depression in the track of the railway, so that the defect would not appear to one using ordinary care in inspecting the engine. The defendants' objection to this evidence was that no allegation is made in the complaint as to this depression, and none that the plaintiff was prevented by it from discovering the defect by the use of

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ordinary care. As this cause must be reversed, and the plaintiff may amend his complaint in this behalf, we express no opinion as to this. The opinions of witnesses as to what a prudent man would have done under the circumstances were not admissible. The court in the sixth instruction ^{Evidence—Opinion.} given at the instance of the plaintiff, said:

"If the jury find from the evidence that at the time plaintiff took charge of the engine to make the trip, on February 5, 1891, the engine was standing in a depression upon the track, then it is a question of fact for the jury to determine whether this would have prevented him, by the exercise of ordinary care and diligence, from discovering the condition of the pilot at that time." This was held in *Fordyce v. Edwards*, 60 Ark. 438, 30 S. W. 758, to be a question of fact for the jury. For the errors indicated, the judgment is reversed, and the cause ^{Inspection of Engine—Due Care—Question for Jury.} is remanded for a new trial.

WOOD

v.

LOUISVILLE & N. R. Co.

(Circuit Court, W. D. Tennessee, E. D., June 2, 1898.)

Injury to Brakeman—Cattle Chute near Track—Negligence.*—The mere fact that a brakeman, while climbing the side ladder to the top of a car, in the discharge of his duty, is raked off by a cattle chute near the track establishes negligence on the part of the Company.

Same—Contributory Negligence.—In an action for injuries so caused, plaintiff not having been chargeable with notice of the exact proximity of the cattle chute to a passing car, the jury properly found him not guilty of contributory negligence.

Same—Damages.—In such action a verdict for plaintiff for \$8,000 was excessive, the loss of one foot and the small toes of the other being the extent of his injuries.

*See notes at end of case.

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This was an action by Horace J. Wood against the Louisville & Nashville Railroad Company to recover damages for personal injuries. There was a verdict for plaintiff for \$8,000, and defendant moves
Case Stated. for a new trial.

The plaintiff was a switchman on the Louisville & Nashville Railroad, and had been so engaged for about three months on a gravel train. Being transferred to the position of middle brakeman on a freight train, which was switching cars on the railroad side tracks, and while in the discharge of his duty, climbing one of the ladders to the top of the car, he was raked off by a cattle chute, which was so near to the track that there was not room for his body to pass without being struck in the manner in which it was. The injury crushed the toes of his left foot in such a way that he lost all the toes by amputation, except the great toe, of that foot, and his right foot was crushed entirely off, just above the ankle, so that he is permanently crippled in both legs. There is a dispute in the testimony as to whether the close proximity of the cattle chute to the rails of the track was the result of the original construction, or whether it had become from long disuse so dilapidated that it had got out of plumb, and for that reason was too close to the track. There was also some dispute in the testimony as to the exact distance between the mouth of the chute and the track, and, as the structure has since the accident been torn down, it is impossible to determine with accuracy just the number of feet and inches, the testimony of the witnesses ranging from an estimate of eighteen inches to four feet. Defendant's witnesses swore that this chute was constructed like all other cattle chutes on the line. Whatever the accurate distance from the track was, the fact is that the plaintiff, while climbing the ladder, was knocked off. The structure had been there for a number of years, and had been for some time out of use, but was left standing as described by the witnesses. The plaintiff swears that he did not know the chute was there, had not observed it while at work, and that

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he did not on the occasion of his injury observe it at all. The jury found a verdict in favor of the plaintiff for \$8,000.

J. W. E. Moore, for plaintiff.

A. D. Bright, for defendant.

HAMMOND, J. (after stating the facts as above). The verdict of the jury is conclusive as to the negligence of the defendant company in the construction of this cattle chute. It is not a question of a few inches more or less of proximity to the track, nor is it a question of the different sizes of the men called upon to operate in or near it, as to whether they could comfortably pass between the mouth of the chute and side of the car while the car was being loaded or unloaded from the cattle pens, as described by the witnesses. Neither is it a question of avoidance, in climbing the ladder, of the too great protrusion of the body by the skillful or unskillful use of the ladder. It seems to me quite unreasonable to demand that a brakeman, intently engaged in moving over a running freight train, and climbing the ladders put there for that purpose, shall make a nice calculation of inches as to the protrusion of his body, so as not to strike an obstruction to which his attention is not specifically called, and which is of such a nature that he would not be required to be on the lookout for it unless particularly informed about the danger. The case of a bridge across the road or an overhanging roof presents a different question. Either is a structure the danger of which is always apparent, and against which the brakeman must be constantly on his guard; but these cattle chutes along the road may be located at any place, and the primary duty of every railroad company in their construction is to see that they are not so close to the track as by any possibility to result in such an injury as this. It is only a matter of the length of the bridge that must connect the cattle chute with the floor of the car which is being loaded or unloaded. Of course, the cattle can be more

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man—Cattle Chute
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readily controlled in passing in or out of the car to or from the chute the shorter this distance is, but by giving a few inches of extra space the structure can be so far removed from the track as to provide against raking a brakeman off who is on the ladders, and against the possible inequalities arising out of any narrower or wider cars that may be moving on the track.

Therefore I think there is no doubt, from the proof in this case, that the jury was right in concluding that this structure was too close to the railroad track, and the cases cited by counsel of passing bridges, station houses, railroad frogs, and structures like that are not applicable to the facts of this case, for the reason that there is nothing in the nature and character of the structure itself to make it dangerous, if it is kept far enough back from the track. The truth is that such a structure might be used for years and years in too close proximity to the track without attracting attention, because the unhappy combination of a brakeman on a ladder at the precise moment of passing the cattle chute would occur very rarely, if ever. Unhappily, it did occur in this case. In overhanging bridges or roofs, the danger is obvious, and threatens every time the trains move under them. Of course, if the cattle chute be allowed to fall into dilapidation, or be out of repair, and become loose in its joints, there would be danger of the few number of inches that might have been allowed in the original construction becoming closed by the falling away of the timber from the close-fitting framework, and that is possibly what occurred in this case.

As to the contributory negligence of the defendant, I think, also, that the verdict of the jury was right. It cannot be required of a brakeman that he shall go about upon the line of a railroad upon which he is operating, and lay a foot rule to all the structures of this kind, and see whether or not they may be so close as to make it necessary that he should be watchful when he is climbing the ladders, or to avoid taking the ladder until the chute shall have

Same—Contributory Negligence.

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been passed. The fact that no accident of this kind had happened before upon the railroad, and that trains were constantly passing this chute without the development of this danger, brings it directly within the class of what we may call "concealed dangers." This danger was lurking for years without its being known. The constituent element of it was a matter of mere inches, and that, in the very nature of things, could not be detected by ordinary observation. It is an idle struggle to escape the liability for this negligence to impute contributory negligence to the plaintiff under the circumstances of this case. Even if he had been aware of the fact that the cattle chute was there, it does not follow that he was aware of the fact that it was a few inches more or less too close to the track; and he had a right to rely upon and believe that the railroad company would not put it too close to the track, or would not permit the customers whom they allowed to build it to put it too close to the track, to injure their employees. It is a danger that does not probably show itself until an accident like this brings it into prominence, either to the railroad owner who operates the road or to the man who originally constructed it. They were thinking of establishing a clearance for the cars, and not for a man climbing the ladders at the moment of passing the chute. That danger was probably not thought of by anybody; not by the constructors any more than by the plaintiff. It is a danger that might arise, and possibly did arise, in this case, because the car on which he was mounted was wider than ordinary cars; or perhaps the ladder might have been constructed so as to have been further away from the side of the car than in the ordinary construction of ladders. Many differences of this kind might appear to make a danger in this particular conjunction of a brakeman on a ladder and a cattle chute too near the track that would not be observable to any ordinary intelligence or observation.

The case was fairly left to the jury, and they have decided these questions of negligence and contributory

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negligence against the defendant, and I think properly so. I can see no error in the action of either the court or the jury entitling the party to a new trial upon that ground.

But the difficulty that I have had with this verdict has been that I have thought all along that it was excessive. In the opinions that I have heretofore written upon this subject, which it is not necessary to cite Same—Damages. here, it will be found that I have always had the greatest reluctance, in exercising the right or power of the court over a verdict, to set it aside because the amount was too large, and I have never exercised the power where the sum was at all reasonable. It is the province of the jury to determine the amount that will compensate for the injury, and it is a denial of the right of trial by jury to interfere with the exercise of this duty by them. Yet it is also one of the rights of trial by jury that the trial judge shall see that the jury does no injustice by being carried away through passion, prejudice, or undue sympathy, and I think in this case they have been misled by their sympathies for this plaintiff into giving a larger verdict than the facts demand. Sentimentally considered, the loss of life or the loss of a limb is irremedial by any sum of money, but this is not the rule of compensation in such cases. It is not the fair rule of judgment.

I know it is not evidence to go before a jury to prove sums that are ordinarily allowed by accident and life insurance companies for loss of life or limb, and there was no such proof as that before this jury, and no proof before the trial judge upon the subject; but, in reflecting upon the question of what is fair compensation for the loss of one's limbs or life, it occurs to me that the common experience of men undertaking to provide for indemnity against accidents resulting in the loss of life or limb may be fairly considered. If the plaintiff had lost his life, I think it is apparent, from his earning capacity and the amount required by him to live, that, in the common experience of switchmen, he would not have been able to earn sufficient

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money, after paying his living expenses, to provide for himself a policy of insurance for \$8,000, upon which he would be able to pay the premiums. He would, from necessity, have had to take a less indemnity and a policy for a smaller amount. He would not be able, fairly and reasonably, to insure his life from his earnings for the sum of \$8,000, nor would he be able to provide the necessary money to insure himself against loss of limb for that amount of money; and perhaps no accident insurance company would have been willing, for any sum of money he would be able reasonably to pay, to have agreed to pay him \$8,000 for the loss of his limb and toes, as that loss appears in this evidence. I mention this only as an argument which has force in my mind, at least, in determining the question, how much money would fairly compensate him for the loss he has sustained?

Taking the young man just as we find him in the proof, I think the verdict is more than he could otherwise have provided as an indemnity against this loss, and I think it is very largely more. Reluctant as I am to interfere with the verdict of a jury upon such a matter, I have concluded to grant this motion for a new trial upon the ground of an excessive verdict, unless the plaintiff shall, within 30 days from this date, enter a *remittitur* of one-half the amount of the verdict. If this is done, there may be a judgment for that amount and the interest since the rendition of the verdict. Ordered accordingly.

NOTES.

Injuries to Employees from Structures near Track.—See *Bryce v. Chicago, M. & St. P. Ry. Co.* (Iowa, 1897), 9 Am. & Eng. R. Cas., N. S., 832, and *foot-note*.

Cattle Chutes.—A railroad company has no legal right to construct cattle chutes in such close proximity to its track as to endanger the safety of employees operating its trains, although by so doing it may be better enabled to load and unload live stock. *Allen v. Burlington, etc., R. Co.* (Iowa), 5 Am. & Eng. R. Cas. 620.

Derrick near Track.—In *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268, it was held that if a railroad company permits a derrick not in

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actual use to remain for an unreasonable time on land within its control so near the track as to be liable to be thrown down across the track, it will be liable to a brakeman for injuries received in an accident caused by the falling of the derrick.

Fence near Track.—An engineer having no knowledge of the proximity of a fence to the track does not assume the risk arising therefrom, it being one resulting from the non-performance of a duty which the law devolves upon the company. *Murphy v. Wabash R. Co.*, 115 Mo. 111, 21 S. W. Rep. 862.

Oil House.—A brakeman cannot recover for an injury received by being caught between a moving freight car and an "oil house" used by the company, and built so near the track that cars cleared it by only a few inches. It was a risk of his employment which the brakeman is held to have assumed. *Kelly v. Baltimore & O. R. Co.*, (Pa.) 11 Atl. Rep. 659.

Platform near Track.—Plaintiff's intestate was injured in attempting to couple cars at side track, adjacent to a platform used for loading stone. In making the coupling he got between the platform and cars, and his lantern, from some cause, got between him and the cars, and was so pressed against him as to inflict injuries from which he died. It was claimed that the defendant was negligent in constructing the platform so near the track. The court instructed the jury that if the track and platform were dangerous, and the company by reasonable care could have learned the fact, and deceased was without knowledge, and could not, by reasonable care, have learned that it was dangerous, and by reason thereof received the injuries complained of, they should find the defendant guilty. *Held*, that the instruction was erroneous; that reasonable care when exercised by the company, could only be expected to reach the same result that would follow from the same care on the part of the deceased; that if his care and diligence could not learn that the platform was dangerous, it was unreasonable to impute notice, or negligence in not knowing, to the defendant. *Chicago, etc., R. Co. v. Clark*, 15 Am. & Eng. R. Cas. 261.

Post near Track.—A brakeman, while descending from a car on a moving train to uncouple cars, was struck by a post erected by the station agent near the track for his own use, and in no way connected with the operation of the road. *Held*, that the brakeman, having no knowledge of the existence of the post, was not negligent in not looking out for it and avoiding striking it, but that the railroad company was negligent in allowing the post to remain in dangerous proximity to the track, and that it was liable for the injury caused thereby. *Kearns v. Chicago, Milwaukee & St. Paul R. Co.*, 22 Am. & Eng. R. Cas. 237.

Signal Post.—If the distance between a signal post and the ladder on a freight car is only one foot, and permanent erections so near the track are few and exceptional, a brakeman who, on his first trip, was ignorant of the proximity of any such erections and was not warned thereof, did not assume the risk of accidents arising therefrom, the danger not being so obviously incident to his employment that he must be presumed to know it. *Scanlon v. Boston & Albany R. Co.* (Mass. 1888), 38 Am. & Eng. R. Cas. 48.

Employees are not presumed to assume the risk of peril occasioned by the nearness to the track of structures like signal posts, in the absence of notice of such dangerous erection. *Johnson v.*

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St. Paul, M. & M. R. Co., 41 Am. & Eng. R. Cas. 293, 43 Minn. 53, 44 N. W. Rep. 884.

Snow Bank.—A railroad company is not chargeable with negligence to its employees in letting a snow bank stand on either side of the track in the manner in which it has been left by the snow plough. *Burlington, etc., Ry. Co. v. Dowell*, (Iowa, 1883), 15 Am. & Eng. R. Cas. 153.

Switch Stand.—On the disputed facts disclosed in the plaintiff's case it appeared that there was a switch stand erected in the defendant's yard close to the track, the deceased, who was a brakeman in the defendant's employment, being aware of its position and proximity to the track. On the day in question the deceased was engaged as a brakeman on a train passing through the yard. His position as brakeman should have been on top of the car, but, for some reason which did not appear, he was on the side of the car, holding on to the ladder, by which brakemen mount to the top of the car, and, his attention being drawn towards the end of the train, he did not see the switch stand, when he was struck by it and thrown under the wheels of the car and killed.

Held, that there was no evidence of negligence on the part of the defendants; and that there was such want of care on the part of the deceased as disentitled the plaintiff, his administrator, to recover; and the case was therefore properly withdrawn from the jury. *Ryan v. Canada Southern R. Co.*, 26 Am. & Eng. R. Cas. 344.

A switchman, who was charged with making up trains, was injured by striking a switch stand within nine or ten inches of a train when moving on the track. *Held*, that the risk of injury arising from such cause was not one assumed by the switchman. *Pidcock v. Union Pac. R. Co.*, 5 Utah 612, 1 L. R. A. 131, 19 Pac. Rep. 191.

An employee does not assume the risk arising from the erection and maintenance of a switch stand and target of such height and in such position and condition that the target will sometimes come in contact with the sides of the cars of passing trains, particularly when such employee of the company knows that the rules of the company prohibit the erection of any such switch stand within less than six feet of the track. *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128, 49 N. W. Rep. 655.

Telegraph Pole.—In *Chicago, etc., R. R. Co. v. Russell*, 91 Ill. 298, it was held to be culpable negligence on the part of the railroad to permit a telegraph-pole to stand for three years so near the track that it was within eighteen inches of passing freight trains.

In *Hall v. Union Pacific R. R. Co.*, 16 Fed. Rep. 744, it was held to be a question for the jury whether the railroad company was guilty of negligence in allowing a telegraph-pole to remain so near to its track that an employee, while in the discharge of his duty, was injured by colliding therewith.

Trestle.—A servant of the defendant had been three or four days engaged as a brakeman and as one of a station-yard crew, he being previously a stranger to the locality. While descending from a moving freight car by a side ladder, he was swept off by a trestle standing 14½ inches from the side of the car, and killed. Case considered sufficient to go to the jury upon the questions (1) of defendant's negligence; (2) as to whether the servant knew this danger, or was chargeable with want of ordinary prudence if he

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had failed to inform himself of it, so that he should be deemed to have assumed the risk; and (3) as to his contributory negligence. *Robel v. Chicago, etc., R. Co.* (Minn. March, 1886), 27 N. W. Rep. 305.

Water Crane.—The conductor of a freight train neglected to give the usual signal to the engineer when passing a station, and the engineer leaned out of his engine to look for the signal, when his head struck against a water-crane near the track and he was killed. *Held*, that a railroad company is not to be regarded as negligent in erecting or maintaining contrivances or things for use in the operation of its road for the reason that they are "dangerous to the persons operating the trains." *Gould, Adm'r. v. Chicago, Burlington & Quincy R. Co.*, 22 Am. & Eng. R. Cas. 289.

Water Tank.—In *Atlanta, etc., Air Line R. R. Co. v. Woodruff*, 66 Ga. 707, it was held that the defendant railroad was liable for an injury caused by negligently erecting a water-tank so near the track as to injure an employee engaged in the discharge of his duties. See also *Houston, etc., R. R. Co. v. Oram*, 49 Tex. 341.

In *Walsh v. Oregon Ry. & Nav. Co.*, 10 Oreg. 250, it was held that the question whether the company was guilty of negligence in maintaining a water-tank too near its track was for the jury.

Wooden Wall.—In an action by the administratrix of a brakeman on a railroad train to recover damages for his death alleged to have been caused by the negligent construction of a wooden wall near the track which fell and crushed him, it is error for the court to entirely disregard in its charge the question of the contributory negligence of the decedent when this has been raised and is material. *North Chicago Rolling Mills Co. v. Morrissey, Adm'r.*, 18 Am. & Eng. R. Cas. 47.

MCDONNELL

v.

ILLINOIS CENT. RY. CO.

(Supreme Court of Iowa, May 16, 1898.)

Injury to Employee—Construction of Roundhouse Pits.—It is not the duty of a railroad company to erect barriers around the pits in its roundhouses, where the barriers would render the use for which the pits are constructed impossible.

Same—Contributory Negligence.*—The contributory negligence of an employee, who knew of the existence of such pits in all roundhouses, and was killed while undertaking to walk in an unlighted roundhouse by a fall into one of them, will bar recovery.

*See note at end of case.

McDonnell v. Illinois Cent. Ry. Co

APPEAL by plaintiff from Linn county district court.
Affirmed.

J. H. Crosby and Rickel & Crocker, for appellant.
Rothrock & Grimm and W. J. Knight, for appellee.

DEEMER, C. J. On and prior to the 9th day of January, 1894, Henry M. McDonnell, deceased, was in the employ of the Burlington, Cedar Rapids & Northern Railway Company, at work in its roundhouse in the city of Cedar Rapids. By an arrangement not necessary to be stated, men in the employ of this company were subject to the call of the Illinois Central Railroad Company for work in its roundhouse. On the night in question, McDonnell and one Drahos were sent by the foreman of the "Burlington" roundhouse to the roundhouse of the Illinois Central Railroad, to do some work upon some of the engines of the latter company. The night was cold and windy. McDonnell started to obey his orders, with a box of tools upon his back and a torch in his hand. He arrived at the Illinois Central roundhouse about 11:30 p. m. The wind had blown out his torch. He entered the defendant's roundhouse at the southeast door, and there met the foreman of the Burlington house. The Burlington foreman had a lantern in his hand, and was standing about midway between this door and the east rail of the eastern track which entered the house. McDonnell inquired for Drahos, who was to assist him in his work; and the foreman directed him to a place near the extreme north end of the house where a man was at work with a torch for his light. McDonnell started in the direction of this light, going diagonally across the house, in a northwesterly direction, and had proceeded but a short distance when he fell into one of the pits which are found in all roundhouses, in order to enable employees to get under and repair engines. From the injuries so received, McDonnell died; and this action is brought by his administrator to recover the damages done his estate. The

Case Stated.

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grounds of negligence alleged have already been referred to, and need not be repeated.

The evidence shows that the roundhouse had three stalls. The south end of the pits built in these stalls were 10 feet from the south doors of the house, and the southeast corner of the east pit was about 6 feet from the door at which the deceased entered. The pit was about 4 feet wide and a trifle over 3 feet deep, and extended north between the two rails of the east track for nearly 50 feet. The house itself was about 70 feet long, and 82 feet wide at the north end, while at the south end it was 40 feet. About midway of the house from the north to the south, and a few feet east of the center, was a post, upon which hung a large lamp facing the north; and against this post was a bench, upon which was an ordinary railway lantern. The Burlington foreman had a lantern. McDonnell had a torch, which was not lighted, and his associate with whom he was at work was at the north end of the building, with a lighted torch. The pits were not guarded or barricaded in any manner, but, in their construction and use, were like pits in all other roundhouses, unless it be that they were nearer the entrance to the house than in some others. There is a dispute as to whether the lamp upon the post was burning at the time of the accident, and also some question as to whether the lantern upon the bench was lighted; and it may have been and doubtless was the question for the jury to determine whether the house was sufficiently lighted. One of the instructions complained of relates to the duty of defendant's servants in the lighting of the house. In our view of the case it is not necessary to consider this question. The evidence clearly shows that it would be impossible to erect any barriers around the pits and do the work about an engine which is intended when the pits are used; so that no negligence can be predicated upon this omission.

Injury to Em-
ployee—Con-
struction of
Roundhouse Pits.

The alleged negligent construction of the roundhouse was properly submitted to the jury, and no fault is

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found with the instructions relating to this matter. That all roundhouses have these pits seems to be conceded, and the evidence conclusively shows that McDonnell knew that this one had them, for he had worked in the very pit into which he fell prior to the time he received his injuries. Having this knowledge, he walked blindly into the pit. Surely this was contributory negligence. If the lantern his foreman had gave sufficient light to indicate the position of the pit, and the deceased failed to look and discover it, he was clearly negligent. If, on the other hand, this lantern did not disclose the position of the pit, and it was so dark that the deceased could not see where he was going, then was he guilty of such negligence that he ought not to recover. He knew the pit was close at hand, or, if he had thought, must have known, for he had been in this roundhouse twice before, and, as a roundhouse employee, knew that such pits are present in all such houses. And yet, according to appellant's theory, although he walked blindly into this pit, he may still recover. We do not think this is so, and in our opinion, it is difficult to conceive of a plainer case of contributory negligence. The trial court instructed the jury, in effect, that if, when the deceased undertook to walk across the engine house, it was so dark that he could not see where he was walking, and if he had a torch with him which he could have lit, and which, when lighted, would have afforded him light enough to have seen the pit, and instead of lighting the torch he continued to walk in the dark, and while so doing stepped into the pit, then plaintiff could not recover. As applied to the facts of this case, showing knowledge of the deceased as to the presence of such pits in roundhouses in general, and in this house in particular, we think the instruction was correct, and that the jury very properly found for the defendant.

Name — Contrib-
utory Negli-
gence.

Some other errors relating to the admission and rejection of evidence, and to the instructions given by the court, are complained of; but, as none of them go to

Note

the question of contributory negligence, they need not be considered. There is no prejudicial error, and the judgment is affirmed.

NOTE.

Injury to Employee—Walking Without Light—Contributory Negligence.—Where a watchman in a railroad yard uses a platform appropriated to the transfer of freights for the purpose of running along it at night in the dark, he does so at his own risk, it not appearing that the platform was intended by the company for such a purpose, or that he had any reason to think it was so intended. *Hamilton v. Richmond & D. R. Co.*, 83 Ga. 346, 9 S. E. Rep. 670.

In an action by an employee for injuries sustained by falling into a pit between a turntable and a water tank while he was walking there at night without any lantern, there being no light in the neighborhood, where the evidence showed that such employee could, by the use of ordinary care, have avoided the accident, he cannot recover, even if the company was guilty of some degree of negligence. *Countryman v. East Tenn., V. & G. R. Co.*, 89 Ga. 835, 16 S. E. Rep. 84.

A person who had been working at the river end of a pier on which railroad tracks were laid, leaving his work after dark, while walking up the pier on the platform, which was raised above the tracks, was injured by falling off. The accident occurred by his turning aside in the dark to pass around some iron that lay on the platform, thinking that he would find the edge of the platform by touching cars that he supposed were there, but which were not there. There was no evidence that he had seen cars at that point during the day, nor that he acted upon information from others who had seen the cars there. *Held*, that he was guilty of contributory negligence. *Harden v. New York, C. & H. R. R. Co.*, 17 J. & S. (N. Y.) 503.

An employee of a railway company, who was employed in its roundhouse, working at night as an engine-wiper, was sent by the foreman on a dark, rainy night, without a light, to assist a gang which was employed at a turntable near the roundhouse. The path to the turntable ran along within 10 or 20 inches of a ditch which had been excavated to replace a sewer which was broken, and at the point where the sewer was broken was a hole of 8 feet in diameter which was frequently filled with boiling water owing to the break; and in passing this hole, the employee fell in and received injuries from the water, which resulted in his death. He knew of the ditch, but there was no evidence to show that he knew of the hole. It appeared that there was no guard or rail to prevent him from falling into the hole, and that the light nearest to the point where he fell in was 5 feet away. *Held*, that he was not, as a matter of law, guilty of negligence. *Grimmelman v. Union Pac. R. Co.* (Ia.), 8 Am. & Eng. R. Cas., N. S., 321.

Savannah, F. & W. Ry. Co. v. Austin

SAVANNAH, F. & W. RY. CO.

v.

AUSTIN.

(*Supreme Court of Georgia, May 26, 1898.*)

Injury to Employee—Use of Mortality Tables by Jury.*—In an action against a railway company for permanent injuries sustained by plaintiff, there was no error in giving in charge to the jury the form suggested in the case of *Railroad Co. v. Burney*, 26 S. E. 730, 98 Ga. 1, in relation to the use which may be made by the jury of mortality and annuity tables. Such form is not open to the objection that it contains any expression of opinion as to what has or has not been proved.

Same—Case at Bar.—The verdict not being contrary to the evidence, and no error of law against the defendant company having been committed, this court will not interfere with the discretion of the trial judge in overruling the motion for a new trial.

(Syllabus by the Court.)

ERROR by defendant from Clinch county superior court. *Affirmed.*

D. H. Pope, for plaintiff in error.

Humphreys & Edmonson, S. L. Drawdy, and *C. M. Hitch*, for defendant in error.

SIMMONS, C. J. 1. It appears from the record that the judge, when charging the jury upon the subject of damages and the manner in which the jury might ascertain the amount thereof, adopted the suggestions made by this court in the case of *Railroad Co. v. Burney*, 98 Ga. 1, 26 S. E. 730. The plaintiff in error excepted to the use of this form, because, it alleges, certain words and phrases therein amounted to expressions of opinion by the court as to what had been proved on the trial. It excepted to the statements: "You have the right to avail your-

*Injury to Employee—
Use of Mortality
Tables by Jury.*

*For the suggestions of the Georgia court as to the form of charge to be used in submitting mortality tables to the jury, see *Florida Cent. & P. R. Co. v. Burney*, (Ga.), 6 Am. & Eng. R. Cas., N. S., 541. As to Mortality Tables, see *notes*, 5 Am. & Eng. R. Cas., N. S., 361.

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selves of the assistance to be derived from them [mortality and annuity tables]. It becomes proper to explain them, and inform you in what manner each can be made serviceable,"—and to other portions of these charges, which may be found in the official report. The form of charge suggested in the above-cited case is not binding upon the trial judges, but it was very carefully and thoroughly considered by this court before it was adopted and promulgated; and, since these exceptions have been taken to it, we have again carefully considered it, and we cannot find, either in the portions to which exception is taken or in any other part of the charge, any expression of opinion as to what has or has not been proved. It is simply an explanation of how and in what manner the tables should be used, if the jury should consider them at all. It appears to us that the judge is bound, when these tables are introduced in evidence, to explain to the jury how they may be used, just as he should explain a table of logarithms if it were introduced in a case involving questions which that table would illustrate. And so he should explain an almanac introduced to show the phases of the moon, or the time of the rising and setting of the sun, etc. It being the duty of the trial judge in a case like the present to explain the mortality and annuity tables to the jury, he having adopted the form of explanation suggested by this court, and this court being of opinion that the form is a proper one, and that it does not express or intimate any opinion as to any fact proved, we think that the trial judge did not err in overruling these grounds of the motion for a new trial.

2. Austin was an employee of the railway company. He was a section master, and was in no way connected with the running of the train or the act of negligence by which he was injured. It seems, therefore, that the charges excepted to in the first three special grounds of the motion for a new trial were not applicable to the case. *Railroad Co. v. Kelly*, 58 Ga. 113. Even had they been applicable to the facts of the case, we think that the criti-

Same—case at
Bar.

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cisms made are not well founded. While the Code uses the words "without fault" with reference to an employee, this court has in many cases construed them to mean the same as "without negligence," and has used "fault" and "negligence" as being in this connection synonymous. The charges, therefore, if applicable, were not erroneous. On the other hand, if they were not applicable to the facts of the case, they could not have hurt the defendant, but worked against the plaintiff, by imposing upon him a burden greater than was authorized by law. Of this the defendant cannot be heard to complain.

The verdict was authorized by the evidence. While it was large, we cannot say it was so excessive as to show bias or prejudice on the part of the jury which rendered it. Questions of this sort are left to the discretion of the trial judge; and when he is satisfied with the verdict, as evidenced by his refusal to grant a new trial, only a very strong case would authorize this court to set aside the verdict as excessive. Judgment affirmed. All the justices concurring.

CHARLESTON & W. C. RY. CO. *et al.**v.*HUGHES *et al.*HUGHES *et al.**v.*CHARLESTON & W. C. RY. CO. *et al.**(Supreme Court of Georgia, July 21, 1898.)*

Condemnation—Title Acquired.—All questions relating to the title, relied on by the plaintiffs in this case, are settled by the decision of this court in the case of *Fleming v. Hughes*, 99 Ga. 444, 27 S. E. 791.

Same.—The interest in the land which is acquired by a railroad company, in a proceeding to condemn under the exercise of the power

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of eminent domain, is whatever interest the person against whom the proceeding is had has in the land, and no more.

Equity—Interveners.—An intervener in an equity suit, praying for relief, both legal and equitable, is bound to give effect to all of the equitable rights in the subject-matter of the controversy which the defendant in the intervention may lawfully set up against him. One who avails himself of a remedy in a court of equity is as much bound by the maxim that he who asks equity must do equity as one who is asserting in such court a pure equity right.

Same—Life Estates—Improvements—Damages.*—Where a railroad company lawfully enters upon property under a conveyance from a life tenant, and makes thereon improvements of a character necessary for its business, it has the right, if it intends to abandon the premises at the expiration of the life estate, to remove such improvements from the property. When it continues in possession after the termination of the life estate, and the property is indispensable to the discharge by it of its public duties, the value of the improvements placed thereon at its own expense, for its own peculiar use, should not, at the instance of a remainder-man setting up equities and seeking their enforcement in an equitable proceeding, be considered in ascertaining the damages to be paid to the latter for his estate in the premises.

Case at Bar.—Under the rulings above made, the only question to be determined, in a subsequent trial of the case, will be what compensation shall be paid to the plaintiffs for the interest of the remainder-man in the property. Direction is therefore given that this single issue be submitted to a jury, and, when the amount is thus ascertained, that a decree be entered authorizing the defendant, within a reasonable time, to be fixed in the decree, to pay to the plaintiffs the amount of the verdict, and that upon payment of the same the interest of the plaintiffs pass to the railway company. Upon a failure of the railway company to pay the amount of the verdict within the time fixed in the decree, its right to purchase the property should be decreed to have been lost, and a writ of possession should issue authorizing the sheriff to place the plaintiffs in possession under the judgment in ejectment already rendered in the case.

(Syllabus by the Court.)

ERROR by both parties from Richmond county superior court.

Action by B. H. Hughes and others against the Charleston & Western Carolina Railway Company and others. From the judgment, both parties bring error. Reversed on main bill of exceptions, with directions, and affirmed on cross bill.

Henry Crawford, S. J. Simpson, and Bryan Cumming, for Charleston & W. C. Ry. Co.

Wm. K. Miller and J. R. Lamar, for B. H. Hughes and others.

*See note at end of case.

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COBB, J. The last will of Charles De Laigle was duly probated and admitted to record in the court of ordinary of Richmond county on May 3, 1866. By the ninth item he made the following devise :

Case Stated.

"To my son Louis I give, devise, and bequeath three other such parts [meaning three-fourths of his estate after the payment of his debts], to be held by him in trust for the sole and separate use of my daughters Martha, Mary, and Emma, one part to each, respectively, for and during the terms of their natural lives, with remainders to such child or children of my said daughters, respectively, as may be living at the time of their respective deaths, and, in default of such child or children, then to the right heirs of each of my said daughters, respectively." After paying the testator's debts, his executors, on April 17, 1867, assented to the devise, and allotted the property in which Emma De Laigle was interested to Louis De Laigle, as trustee for her during her natural life, with remainder and executory devise over as mentioned above. At that time Emma De Laigle, the life tenant, was a minor and unmarried. Louis De Laigle, the original trustee, died in 1867, after the division of the testator's estate ; and on October 14, 1868, while Emma De Laigle was still a minor and unmarried, Andrew W. Walton, upon her application, was appointed as trustee for her alone by the judge of the superior court of Richmond county. She attained her majority on March 9, 1869, being still single. Walton resigned as trustee on March 5, 1869, and on the next day E. F. Verdery was appointed trustee for her alone, upon her application, by the judge of the superior court. No bond was required of Verdery and none was given by him. In 1870, while Emma De Laigle was still unmarried, upon the joint petition of herself and Verdery, an order was granted authorizing Verdery to sell the fee in certain property for reinvestment, and it was sold by him under such order in that year. After the passage of this order Emma De Laigle married, and died on January 13, 1894, leaving one child surviving her, who was

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born on March 17, 1872, and who intermarried with one Hughes. After the passage of the order above referred to, Verdery, the trustee, sold the property to Alfred C. Holt for the sum of \$4,000, and conveyed the same to him in fee simple by a deed dated September 9, 1870. Verdery resigned as trustee after Mrs. Hughes was born. Thereafter, in proceedings regularly had, in which Mrs. Hughes was a party, represented by her mother as her next friend, Joseph B. Harris, her father, was appointed trustee in the place of Verdery, and ordered to give a bond in the sum of \$4,500, and upon the giving of such bond Verdery was directed to turn over to him all the trust property he held as trustee for Mrs. Harris and her child. Harris, as trustee, gave the bond required. In 1872 the Port Royal Railroad Company, a corporation of this state, located its line of road across the land which had been acquired by Holt under the deed from Verdery, trustee. The company not being able to agree with Holt as to the compensation to be paid to him for the acquisition of the strip required for its purposes, condemnation proceedings were instituted against Holt to have the value of the same assessed, in accordance with the provisions of the company's charter. The only parties to these proceedings were the railroad company and Holt. The amount fixed by the appraisers not being satisfactory to the railroad company, an appeal was entered to the superior court, and on the trial there a verdict in favor of Holt for the sum of \$1,100 was the result. No judgment was entered upon this verdict. The amount specified was subsequently paid to Holt, who conveyed the property in fee simple to the railroad company by a warranty deed dated May 8, 1873. The railroad company entered into possession and placed thereon a part of its tracks which were necessary to a complete construction and operation of the railroad which it was authorized by its charter to build. The Port Royal Railroad Company having mortgaged its entire property, including the strip acquired from Holt, to secure a large issue of negotiable bonds, and

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default in the payment of the same having been made, in 1878 a decree of foreclosure was made by the circuit courts of the United States for the district of South Carolina and the Southern district of Georgia; and under such decree a sale was had, at which certain persons, representing the creditors of the corporation, became the purchasers, and afterwards conveyed the same to a new corporation created by the laws of the states of South Carolina and Georgia, and called the Port Royal & Augusta Railway Company. The latter company executed two mortgages upon its entire property to secure a large issue of bonds, and in 1893 default in payment upon these bonds was made. Thereafter a proceeding in equity was instituted in the superior court of Richmond county to foreclose the mortgages executed by the railroad company to secure the issue of bonds above referred to, and a receiver was appointed to take charge of the property and assets of the company. The strip of land which had been acquired by the Port Royal Railroad Company from Holt passed into the possession of the receiver.

On August 20, 1896, Mrs Hughes, W. K. Miller, and J. R. Lamar presented a petition to the judge of the superior court, setting forth that they were the owners of the land in the possession of the receiver which was described in the deed from Holt to the Port Royal Railroad Company; that upon the same there had been erected six railroad tracks, which were now in the possession of the receiver, and in use by him as a part of the railroad yard and terminals, in the city of Augusta; that Mrs. Hughes acquired title to the property under the will of Charles De Laigle, and became entitled to possession on the death of her mother, Emma De Laigle Harris, which occurred on January 13, 1894: that she had conveyed an undivided half interest in the same to W. K. Miller and J. R. Lamar; that the property is of great value, to wit, \$5,000, or other large sum, and that the railroad iron laid upon the same is the property of petitioners, and is of the value of \$750, and the yearly rental value of the property is \$600, or other

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large sum; that the company is insolvent, in the hands of a receiver, and its assets in the state of South Carolina are also in the hands of a receiver, and the property of the company is about to be sold under a final decree in that state advertised to take place on the first Tuesday in September, 1896; that petitioners cannot obtain payment for the use of their land, nor eject the receiver therefrom, without the permission of the court. They pray that they be allowed to sue the receiver and for *mesne* profits from January 13, 1894, and that, unless arrangements can be made for the purchase of the same, the receiver be ejected, and possession be surrendered by the court to them; that, pending the final determination of the issue, the receiver be enjoined from surrendering possession of the property in Georgia, and the assets and income in his hands, until the final order of this court; and that the receiver hold up sufficient money to pay the judgment that may be rendered.

On this petition the presiding judge passed the following order: "Read and sanctioned. Let this petition be filed. Petitioners are allowed to intervene in said cause, and to sue J. H. Averill, receiver of the Port Royal & Augusta Railroad Company; and he and said company are required to show cause before me on the 31st day of August, 1896, in the superior court room at Augusta, Ga., why the prayer of the petitioners should not be granted. In the meantime he and the said company are restrained from changing the existing status of the said property or permitting the same to be sold in the state of South Carolina, as advertised, until further order of this court. August 20, 1896."

On August 31, 1896, the receiver filed an answer to the petition of the interveners, in which some of the allegations were denied, and others were neither admitted nor denied, for the alleged reason that the receiver was not informed as to the matter. It was alleged that when he was appointed receiver he found the Port Royal & Augusta Railway Company in possession of the property, and the same passed into his possession, and he is informed and believes that the rail-

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way company had been for many years in open and peaceable possession of the same, claiming it as its own, in good faith, adversely to the claims of all others. The prayer of the answer was that the interveners be required to make strict proof of their allegations, and that, if it be shown to the court that they are the owners and entitled to possession, he be allowed a reasonable opportunity to ascertain what will be a fair and reasonable price at which to acquire the lot and negotiate for the purchase thereof, subject to the final approval of the court, and that, in the event the interveners and the receiver fail to come to an agreement as to the price to be paid, the question be submitted to a jury, and, if the amount found in favor of the interveners meet with the approval of the court, he have the option of acquiring the same at the price so found; that, if in the meanwhile the property of the railway company shall have been sold in pursuance of the orders of the court, the purchasers have the option of acquiring the lot at such price.

Thereafter, on the same day, the receiver filed an amendment to his answer, in which it was alleged that Charles De Laigle devised a certain parcel of land to trustees for the use and benefit of his daughter Emma De Laigle; that Verdery was appointed successor to the trustee named in the will, and by an order of court made a deed to Holt, undertaking to convey the fee-simple title, and that he is informed and believes that both Verdery, trustee, and Holt believed that the fee in the land was acquired by Holt under the conveyance; that thereafter Holt executed a deed undertaking to convey to the Port Royal Railroad Company a fee-simple estate in the land described in the petition of the interveners, which is a portion of the tract which Holt acquired under the deed from Verdery, trustee; that Holt and the company believed that the fee-simple title had been acquired; that thereafter the property of the Port Royal Railroad Company was sold, and a deed to the same was made, including the land in dispute, to the Port Royal & Augusta Railway Company; that by

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virtue of the several conveyances, and in the belief that it had acquired a fee-simple estate in the strip of land, the Port Royal & Augusta Railway Company entered upon and took possession of the same, and as its receiver respondent took control of it as the property of such company. It is further alleged that the first information that the receiver ever had that interveners claimed title to the land in controversy was when their petition was served upon him.

On April 28, 1897, the receiver filed another amendment to his answer, in which it was set up that the Port Royal Railroad Company acquired a right of way over and through the premises sued for, by virtue of condemnation proceedings had in accordance with the powers conferred upon such company in its charter, as will fully appear by the record of the court in which the present case was pending, and that the receiver is the successor to the right so acquired by the Port Royal Railroad Company.

On the same day the following order was passed : "The Charleston & Western Carolina Railway Company having purchased the property of the Port Royal & Augusta Railway Company, and being in possession of the said property and that sued for by B. H. Hughes *et al.*, ordered that the said Charleston & Western Railway Company be allowed to defend the claim filed by B. H. Hughes *et al.*, and to file the pleas this day presented."

The pleas of the Charleston & Western Carolina Railway Company, which were referred to in the order, were, in substance, as follows : It denies that the petitioners, or either of them, have any right, title, or interest, at law or in equity, in or to the premises in dispute. It admits that the main line and tracks of the Port Royal Railroad Company were located and constructed over the strip of land sued for about the year 1873, and that ever since that time the land, and the tracks thereon, have constituted an indispensable portion of the main right of way and railroad of that company, and now of the defendant, and that the same

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has been operated continuously, as a part of the public highway from Port Royal to the city of Augusta, for more than 20 years. It admits that Mrs. Hughes was the only surviving child of Emma De Laigle Harris, and that the latter died on the date alleged. The land sued for was once owned by Charles De Laigle, and passed under his will to Louis De Laigle as trustee for Emma De Laigle and her children. That Walton was appointed trustee to succeed Louis De Laigle, and that Verdery was appointed to succeed Walton. That on September 9, 1870, upon the joint petition of Verdery, trustee, and Emma De Laigle, the sale of the property was authorized, Emma De Laigle at that time being the only beneficiary of the trust *in esse*. That, in accordance with the order, the land was sold to Holt, the trustee conveying to him in fee simple. That the purchase money (\$4,000) was paid in cash to the trustee, who invested it for the benefit of the trust estate. That subsequently Verdery resigned the trust, after Mrs. Hughes, the petitioner, was born, and that on the petition presented by Mrs. Hughes on her own behalf, and as next friend to her daughter, Joseph B. Harris was appointed trustee. That Verdery fully accounted for the amount received by him, and paid the same over to Harris, trustee, after the execution by Harris of a bond required by the order of court. That Mrs. Hughes has never repudiated or disaffirmed the petition that was filed in her behalf, or restored the money paid for her use. That the Port Royal Railroad Company had acquired the premises in dispute as a right of way under condemnation proceedings which were authorized by its charter. That under such proceedings it acquired title and went into possession, and at great cost proceeded to construct the main track of its railroad, placing thereon divers side tracks which were necessary for its use, and completed the construction of its entire railroad from Augusta to Port Royal, S. C. That the property passed from the Port Royal Railroad Company to the Port Royal & Augusta Railway Company by virtue of the decree

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rendered in the foreclosure proceedings brought by the bondholders of the former company. That in 1893, in the foreclosure proceedings had against the Port Royal & Augusta Railway Company under authority of the orders of court passed therein, receiver's certificates to the amount of \$100,000 were issued, and declared to be a first lien upon the entire line of railroad in the possession of the receiver. That none of such certificates were ever paid, and that the entire property of the railroad was sold because of the nonpayment of the same, together with a large amount of the other indebtedness of the receiver, amounting to not less than \$150,000. That the defendant became the purchaser of the Port Royal & Augusta Railway Company at such sale, and received a conveyance of the same from the master. That under the law of Georgia, the trustee of such a trust as was created by the will of Charles De Laigle was not only for the benefit of the life tenant, but was to preserve the contingent remainders, and that Mrs. Hughes and her grantees are concluded, and especially under the sale of the trustee to Holt. That Mrs. Hughes elected to ratify and affirm the sale when she applied for the appointment of Joseph B. Harris as trustee, under which order the purchase money received by Verdery, trustee, was recognized as representing the entire estate in the property, and turned over to Harris, trustee, as such. That Mrs. Hughes well knew all of the facts and when she became of age did not disaffirm such transactions, or undertake to avoid the condemnation proceedings, until August, 1896, and stood by and allowed the railroad company to occupy that portion of its right of way many times a day, using the same for the hauling thereon of trains carrying passengers, freight, and mails. That petitioners are not entitled to maintain an action of ejectment or destroy the unity of the property as maintained and enjoyed for more than 20 years, and thus deprive the public of the benefit of a completed and operated railroad. The court sustained a demurrer to the plea of the Charleston & Western Carolina

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Railway Company, and this ruling is the basis of one of the assignments of error in the main bill of exceptions.

Thereafter the Charleston & Western Carolina Railway Company offered the following amendment to its pleading: "Now comes the Charleston & Western Carolina Railway Company, admitted to defend against the intervention of B. H. Hughes and others, and presents for refileing, under the sanction of the court, its original answer, and protesting against any judgment or decree against it, and reserving the right to except thereto, and reserving also all exceptions heretofore made, and the right to insist thereon. For an amendment to the original prayer of the answer, prays that the court order that, if any verdict or decree is rendered against this defendant, the Charleston & Western Carolina Railway Company, that it be not one of ejectment, but a money verdict for the value of the land, upon the payment of which this defendant may retain the premises in dispute."

The presiding judge refused to allow the original answer to be refiled with the amendment, and this is assigned as error. While the original answer of the defendant was stricken on demurrer, it appears from the record that at the trial of the case all of the evidence which would have been admissible under such an answer was admitted, and the facts appearing in such evidence are set forth in the first part of this statement. After all the evidence was submitted, the judge directed the jury to find for the plaintiffs the premises in dispute, but that the railroad iron thereon was the property of the defendant. Upon this verdict a judgment was entered for the plaintiffs against the defendant for the party property in dispute, and directing a writ of possession to issue, and authorizing the sheriff, on demand of the plaintiffs, to put defendant, its agents and servants, out of possession. Thereupon the defendant excepted, and the plaintiffs, by cross bill, complained of rulings which will be hereinafter referred to.

The errors assigned in the main bill of exceptions

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were: First, the court erred in sustaining the demurrer to the original answer of the defendant; second, the court erred in refusing to allow the defendant to refile its answer with the amendment so as to have a money verdict against the receiver, because if, under the evidence, petitioners show a title in them, which would ordinarily authorize a recovery in ejectment, in the present case there should be a finding for a sum of money, or a decree authorizing the receiver to acquire the premises by the exercise of the power of eminent domain enjoyed by the Port Royal & Augusta Railway Company. The assignments of error in the cross bill of exceptions were that the court erred in directing the jury to find for the defendant the iron rails and other improvements located upon and permanently attached to the railroad, it being insisted that such rails and other improvements, being permanently attached to the railroad, should pass with the real estate.

1. The item of the will of Charles De Laigle under which the petitioners derived title was construed by this court in the case of *Fleming v. Hughes*, 99 Ga. 444, 27 S. E. 791. It was there held that the legal title passed to the trustee as to the life estate only; that the remainder created was a legal, and not an equitable estate; and that, therefore, the order of sale which was granted on the application of Verdery, trustee, did not authorize the sale of any other interest in the land than the life estate of Emma De Laigle. The only interest acquired by Holt under such sale being the life estate, that was all that he could convey. By the terms of this decision, the title to the fee vested in Mrs. Hughes upon the death of her mother, on January 13, 1894. It appears, therefore, that all the issues raised in the present case involving the question of title are conclusively settled by the case cited.

2. The Port Royal Railroad Company was incorporated by an act of the general assembly approved December 19, 1859, and by its charter it was declared that "the said company shall possess and enjoy the same privileges as to right of way as are vested in, and enjoyed

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by, the Central Railroad & Banking Company of Georgia." Acts 1859, p. 324. In the charter of the Central Railroad & Banking Company it was provided that that company should have power to construct a railroad, "paying to the owners of lands through which the same may pass a just indemnity" for the value of the land covered by the railway and the right of way on either side thereof. If the company could not acquire the title to the right of way by purchase, it was provided that the amount of damage or injury occasioned by the construction and maintenance of the road should be ascertained and determined by the award of three appraisers, one to be chosen by the company, one by the "owner," and one by the inferior court of the county where the land lay; and, if the "owner" should decline to appoint an appraiser, then two were to be appointed by the inferior court,—the finding of the appraisers to operate as a judgment for the amount against the company, either party having the right to appeal from the award of the appraisers to a special jury in the superior court. It was provided that "the decision shall vest in the company the fee simple of the land in question, and in the other party a judgment for its value." In making the valuation the appraisers should, in case of appeal to a jury, take into consideration the loss or damage which may occur to the "owner" or "owners" in consequence of the land being taken, and also the benefit and advantage to be received from the construction of the railroad. Prince's Dig. pp. 331, 332 (Acts 1835, p. 217). It will be seen that, under the charter above quoted from, it was contemplated that the right of way should be acquired by purchase from the "owner" of the land, and that, upon failure of the company and the owner to agree upon the amount to be paid, condemnation proceedings could be had in the manner above referred to, and that the persons against whom such condemnation proceedings must be instituted were the owners of the property; that is, the same persons with whom the company would be required to negotiate for the purchase of the

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property. The persons, therefore, who are the owners, **and** who would have to be consulted if a purchase at private sale was desired, are the ones who should be made parties to the condemnation proceedings. If the person in possession of the property was not clothed with the power to make a conveyance of the interest of another in the same property, then such person could not acquire the right to dispose of the interest of the other party by submitting to condemnation proceedings to which the other person at interest was not a party, nor deprive the other of his right to assert his interest, whatever it may be, against the corporation instituting the condemnation proceedings. If a life tenant could not convey to a railroad company for a right of way the interest of a remainder-man, the most solemn judgment that could be rendered in condemnation proceedings, to which the railroad company and the life tenant alone were parties, could not operate as an estoppel upon the remainder-man. It becomes necessary in the present case to determine whether, in condemnation proceedings instituted under the provisions of the charter referred to against a person who was the assignee of the life tenant, the interest of a contingent remainder-man, who was not *in esse* when the proceedings were had, passed to the railroad company. The award of appraisers in such proceedings operates as a judgment between the parties, and is governed by the same rules that would ordinarily be applied to judgments of courts; and such an award, or a verdict and judgment on appeal from the same, has the same force as an ordinary judgment rendered by a court of competent jurisdiction. It is conclusive upon the parties and privies, but it is not binding upon strangers. If, at the time the condemnation proceedings were had there were two estates in the property, one a life estate and the other a contingent remainder, the fact that it was impossible to ascertain the persons who would eventually take as remainder-men upon the happening of the contingency provided for in the will would not authorize the conclusion that the interest of

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such remainder-men was acquired by proceedings against the life tenant, who, under no circumstances, could be held to represent them. If the condition of the title to the property at the time of the condemnation proceedings is such that notice cannot be given to all interested, notice to such that are definitely known to be interested would not be held to be sufficient to ~~deprive of their rights~~ others whose identity was unknown, but whose interest in the property was ascertainable. Condemnation proceedings pass title to whatever interest the parties who took part in the proceedings have in the property, and a party who could not be notified is not bound by the award or judgment. In such cases the railroad company would fail to acquire a perfect title to the property; and this imposes no greater hardship upon a railroad company than it does upon any other person who desires to purchase property in which there is a contingent interest outstanding in some one whose identity cannot be determined at the time of the purchase. The condemnation proceedings are no more than a compulsory sale of all the owner's interest in the property, and no one can be thus compelled to sell who is not a party to the judgment rendered by the tribunal which is erected for this purpose. Therefore a railroad company which sees proper to construct its railway over land where the title is in the condition above referred to acquires the interest of all those with whom it deals by negotiation, or against whom it proceeds by condemnation, but takes the risk of other persons interested making claims in the future, whether they be left out of negotiations or the condemnation proceedings by mistake or from necessity. In the present case condemnation proceedings against the assignee of the life tenant, to whom the entire amount awarded as damages was paid, is pleaded in bar of the right of the remainder-man in the same property to have compensation for her interest after the termination of the life estate. This cannot be the law for, if so, the right of the legislature to confiscate in the interest of public improvements, under the guise

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of condemnation proceedings, would be complete, it being only necessary that one person who was interested in the property should have notice, and by such notice the interest of every other person would be held to pass, although ignorant of the proceedings under which their property was taken. Under the ruling made in the case of *Fleming v. Hughes*, *supra*, Emma De Laigle had only a life estate in the property, and this was the only estate acquired by Holt under the purchase from Verdery, trustee. Holt, therefore, represented no one but himself, and, in the condemnation proceedings instituted against him, his interest in the land was all that could be affected by the judgment. As he did not acquire the interest of Mrs. Hughes, and as it is not pretended that any part of the money paid to him by the railroad was ever paid over to Mrs. Hughes, or to any one authorized to represent her, or was ever used for her benefit in any way, the condemnation proceedings, if they had terminated in a regular judgment, instead of a conveyance voluntarily executed by Holt in accordance with the verdict of the jury, could not be used against Mrs. Hughes to raise either an estoppel by record, or any other estoppel, which would have the effect of preventing her from asserting her rights in the property. Under this view of the case, it is unnecessary to determine whether the condemnation proceedings were invalid on account of one of the arbitrators not having been regularly appointed, or whether the railroad company waived its rights under the condemnation proceedings by taking the deed from Holt. Holt was lawfully in possession of the life estate under the conveyance made to him by Verdery, trustee, and he had a right to sell that interest, and the same passed to the railroad company under the deed which he executed to it after the verdict had been rendered in the condemnation proceedings. In the case of *Railroad Co. v. Stroud*, 45 Ark. 278, it was held that it was incumbent on the railroad company, which was seeking a condemnation of a right of way, to ascertain the owners of

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the land, and make them parties to the proceedings, and by selecting the parties against whom it proceeded it admitted their ownership. In the opinion, COCKRILL, C. J., referring to the rule above stated, says: "The company alone can start the proceedings, and when it does so it must proceed against the owner, and it selects the parties to be proceeded against at its peril, because, by starting the proceedings against them, it admits that they are the owners. This is no hardship on the company. The records and other means of information are open to it, and, if the title to the land to be taken is uncertain or in dispute, it may bring all persons who appear to be owners or part owners into court, and, when the damages are assessed and paid into court, leave the contending claimants to settle among themselves their controversy as to the fund awarded."

3. When a railroad company, without warrant or authority, enters upon the land of another, it is, as a general rule, no less a trespasser than any other person who is guilty of an act of a similar nature. If, however, a railroad company enters upon the land with the consent of the owner, or under license from him, and the property thus taken possession of becomes such a necessary component part of its railroad as that to surrender its possession would interfere seriously with the interests of the company, the landowner, although entitled to compensation for his property, might by his conduct in allowing the entry upon his land, and permitting the company to so use it as that it could not be abandoned without great prejudice to its rights, estop himself from asserting against the company the legal title to the property by an action of ejectment. The propositions above stated are simply the application of familiar principles of law which govern in all transactions of the character above referred to, whether the controversy be between natural persons alone, or between such persons and corporations, and whether the corporation be public or private. A railroad corporation, being one charged by

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the law with the performance of certain duties to the public, is allowed, under some circumstances, to set up rights connected with the land over which it operates its line of railway, of which an individual or an ordinary private corporation would not generally be allowed to avail itself. Controversies in reference to the possession of land, where the rights of individuals only are involved, are purely matters of private concern. Controversies in which a corporation charged with the duties incumbent upon carriers of passengers, freight, and mails, in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession which is absolutely essential to its complete performance of the public duties required of it, become matters of more than private concern, and in which the public is deeply and seriously interested. For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another in reference to the possession of land will not be allowed to one who is seeking to recover such property from a railroad company, when exact justice can be done to such owner by giving to him remedies which are less severe in their nature, and by which he would secure substantially the same rights, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject matter of the controversy. That a railroad corporation has a right to deprive a person of his property for its uses, by doing acts which in an individual would be dealt with as a trespass, is not contended for; but when a railroad company enters upon land, and constructs its road without lawful authority, and the landowner acquiesces in the wrongful act, and the consequent appropriation of the property to a great public use, until the same has become a necessary component part of the property required by the railroad to perform its public duties, such landowner will be held to have waived his right to retake the property, and will be remitted to such other

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remedies for the wrong done him as will not interfere with the rights of the public to have the railroad maintained and operated. If this is the case in reference to unlawful entry, for a stronger reason the same result would follow if the entry by the railroad company in the first instance was by the authority or consent of the land owner, even though it be under a parol license, and the legal title to the land still remain in the landowner. The current of modern authority sustains the proposition that when a railroad company is in possession of land, using it as a right of way, although not having acquired the legal title thereto, the landowner would be estopped from ejecting the company from the premises, if it was shown either that the original entry was with his consent, or that the entry without his consent was so long acquiesced in that to allow the company to be ejected would either dismember the property of the company, or essentially interfere with its ability to discharge the public duties incumbent upon it. This, however, is subject to the qualification that the landowner is entitled to compensation for his property, and this must be ascertained and paid to him before the corporation is vested with a complete right to hold and enjoy his property as its own. In the case of *Railway Co. v. Allen*, 113 Ind. 581, 15 N. E. 446, the general rule is stated to be that, when land is seized by a railroad company without right, the owner may maintain ejectment; but, where there has been an acquiescence on the part of the owner until public rights have intervened, such action will not lie, but the landowner will be confined to a recovery of compensation. In *Railway Co. v. Beck*, 119 Ind. 124, 21 N. E. 471, it was held that "a landowner who stands by, without demanding compensation, until a railroad company has so far completed and put into operation its road over his land as to involve the public interest, can neither enjoin the company nor maintain ejectment to recover his land. The only remedy left to the landowner, in such a case, is to proceed, within the proper time, to have his damages assessed and enforced against the railroad company."

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In the case of *Railroad Co. v. Pfeuffer*, 56 Tex. 66, it was held that, where land was appropriated by a railroad company without authority, the right of the owner to compensation was not waived by his standing by and permitting the company to construct its road over his land, nor was his right to recover the land lost, if the company refused to make compensation. In the case of *McAulay v. Railroad Co.*, 33 Vt. 311, it was held that where a landowner acquiesced in the occupation of his land for the construction of a railroad, without requiring prepayment of damages, upon a contract for future payment by the company, and the road was constructed and put in operation, that he could not afterwards, on failure to obtain payment, maintain ejectment or trespass for the land. See, also, *Roberts v. Railroad Co.*, 158 U. S. 1, 15 Sup. Ct. 756; 3 Elliott, R. R. § 1049. In those cases where it has been held that the land owner would be entitled to bring suit against the company in ejectment, and where a judgment in ejectment was allowed to be rendered, it was also held that, upon pleadings, the issuing of a writ of possession would be stayed until the company could be allowed a reasonable time in which to acquire title to the property, either by purchase or condemnation, or that the enforcement of such a judgment in ejectment would be enjoined for a similar reason. *Railroad Co. v. Bruce*, 102 Pa. St. 23; *Railroad Co. v. Jones*, 59 Pa. St. 433; *Conger v. Railroad Co.*, 41 Iowa, 419; *Railroad Co. v. Adams* (Fla.) 10 South. 465. In the case of *Young v. McKenzie*, 3 Ga. 31, it was held that an action of ejectment against a bridge company to recover property in its possession and necessary for the purpose of building the bridge, but to which the title had not been acquired either by purchase or condemnation, should be enjoined until the bridge company should have a reasonable time to comply with the terms of its charter in reference to condemning the property for its use. In this case there had been an attempt to acquire the land by condemnation, which failed for the reason that the proceedings before the appraisers were recorded in the

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wrong place. Under color of this authority, the land was entered upon and the bridge built, and this was one of the reasons which brought the court to the conclusion that, in equity, the company should not be ejected until an opportunity had been afforded it to acquire the land by condemnation.

It is contended, however, in the present case, that, as the title acquired by the railroad company under the deed from Holt was for the life estate of Emma De Laigle only, upon her death the title immediately vested in Mrs. Hughes, and that same. the possession of the railroad company, relatively to Mrs. Hughes, became wrongful and unauthorized, and that, therefore, she is entitled to treat it as a naked trespasser upon her property, she having done nothing which would amount to a consent on her part to the appropriation of the property by the company, and the lapse of time between the death of her mother and the filing of the suit not being sufficient to have amounted to such an acquiescence as would deprive her of the right to maintain an action of ejectment against the company. Nothing appears in the record which would amount to an estoppel against her. There was no evidence that she received any part of the money which was paid to Verdery, trustee, when the property was sold to Holt, nor that any part of the same was ever used for her benefit; nor has there been any ratification of the acts of these persons who attempted to convey to the railroad company her interest in the property; nor has the time which has elapsed since her right of entry accrued been of such duration as to show an acquiescence in the wrongful appropriation of her property. The case should be treated as one in which the owner of the land who is asserting title against the railroad company, never consented to its occupation by the company, either by herself or by any one authorized to represent her. But, while this is true, we do not think that, under the circumstances of this case, Mrs. Hughes should be allowed to treat the company as a naked trespasser. Its entry upon the property in the lifetime

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of Emma De Laigle was lawful and authorized. At the time of its entry, and, so far as the record shows, up to the time of the claim now set up by Mrs. Hughes, it and its successors believed that they had acquired a fee-simple title to the property, the deeds under which they claimed purporting to convey such an estate. Their right to possession after the death of Emma De Laigle was at least colorable. It has been said that "an original entry by the consent of a tenant for life is lawful, and will not subject the party entering to an action for damages on the part of the remainder-man, although damages have not been paid." Mills, Em. Dom. § 142. The statement above made was quoted approvingly and followed in the case of Railroad Co. v. Goodwin, 111 Ill. 273. In the case of Austin v. Railroad Co., 45 Vt. 215, it was held that where a railroad company had entered into possession of property with the consent of the life tenant, and continued to use and possess the same after the termination of the life estate, to the exclusion of the remainder-man, and without appraisal or payment of damages, the remainder-man could not maintain ejectment against the company. Even if we were disposed to do so, it is not necessary for us to go to the length of the decisions just cited. We are of opinion that the petitioners in the present case have waived their right, if any they had, to insist, in the first instance, upon a judgment in ejectment against the railroad company, not by anything they have done before they instituted their suit, but by the way in which they have brought their suit, and the character of the same, and of the relief prayed in the original petition. The assets of the Port Royal & Augusta Railway Company were in the custody of a court of equity, through the medium of a receiver, and he had possession of the property now in controversy. The petitioners did not apply to this court for leave to go into a common-law court and assert there a strict and technical common-law right, but they applied to this court of equity to be allowed to come in and make themselves parties to the pending suit, and set up their

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right in such suit against the receiver and the company which was represented by him; and they prayed for a judgment declaring them to be the owners of the property described in their petition, and that they be placed in possession of the same, if the court should decide in their favor; and distinct prayers were made for an order in the nature of an injunction against the receiver to prevent him from delivering any of the property in Georgia to those who might become purchasers under the order of court in the state of South Carolina until the issues raised by them should be determined; and, further, that the receiver should be required to retain in his hands a sufficient sum of money to pay the judgment that might be rendered in favor of petitioners. On this petition the court passed an order allowing the petitioners to intervene in the cause, and granted an order restraining the receiver from changing the existing status of the property, or permitting the same to be sold in the state of South Carolina, as petitioners alleged was about to take place. The petitioners have not only resorted to a court of equity to set up their claim, but they have come in praying in their behalf distinct equitable relief. They practically concede that a contingency may arise in which the parties in possession of the land claimed by them would be authorized to purchase the same, such being the inevitable inference to be drawn from the prayer asking that a sum of money be impounded in the hands of the receiver for their benefit. "He who would have equity must do equity and give effect to all equitable rights in the other party respecting the subject-matter of the suit." Civ. Code, § 3924. The meaning of this maxim is "that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging

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to the adversary party, and growing out of, or necessarily involved in, the subject-matter of the controversy. It says, in effect, that the court will give the plaintiff the relief to which he is entitled only upon condition that he has given, or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject-matter of the suit." 1 Pom. Eq. Jur. § 385. Any one going into a court of equity, and asking its aid, whether that aid be such as could be obtained in a court of law, or whether it be of a character obtainable only in a court of equity, submits himself to the jurisdiction of the court, and in asking its aid subjects himself to the imposition of such terms as well-established equitable principles would require. Especially would this be true where the relief sought by the party applying to the court is both legal and equitable in its nature. No one can read the facts of the present case without being impressed that there is an overwhelming equity in favor of this railroad company being allowed to purchase from the petitioners the property owned by them, and which is so necessary to the complete operation and maintenance of the company's road in the discharge of its public duties. Whatever might have been Mrs. Hughes' rights against the company, if she had sued at law, or if she had obtained leave of this court of equity to have maintained at law an independent suit, against the receiver, or other persons in possession, under the remedy which she has elected, she is bound to submit the subject-matter of the litigation to the adjudication of the court upon equitable principles. Her right to insist upon a judgment of ouster in the first instance is therefore gone, if the defendant desires to insist upon its right to purchase the property; and the pleas of the defendant, which set up its right to have the value of the property passed upon by a jury, that they might be given an opportunity to purchase and pay for the same, were good, in substance, and should not have been stricken.

It is contended, however, that as the defendant is a

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foreign corporation, and as it has no authority, under the laws of this state, to acquire property by condemnation, it had no right to come into court and file a plea asking that what was equivalent to a condemnation be had in the pending suit. While it is not a corporation organized under the laws of this state, by comity it is permitted to come into this state, and is here discharging public duties of the nature usually performed by corporations of that character, and it is as fully under the control of the laws of this state in regard to the discharge of such public duties as if it had been incorporated under our laws. As a foreign corporation, it has the right, until stopped by the state, to maintain and operate its railroad within the limits of this state. In order to exercise this right, the property in controversy is an essential part of its right of way and terminals. Such being the case, the equity in its favor, requiring that the court of equity to which petitioners have applied should accord to it the right to acquire by purchase the possession of the property before a harsh judgment of ouster should be rendered against it, is just as strong as if they had authority to acquire possession of the property under the exercise of the power of eminent domain. The equity in favor of a railroad company, in such a case, does not grow out of the right it might have under the law to acquire title to the property in which it happens to be in possession, but it grows out of the fact it is in possession of the property; that the entry of its predecessor in title was lawful and authorized; and that the same has become a necessary component part of the property of the corporation, which is discharging duties of a public nature. The court should have allowed the pleas filed, and, after the damages had been assessed by a jury, a decree should have been entered allowing the defendant a reasonable time, to be stated in the decree, to pay the damages so assessed, and, upon its failure to pay the same within the time specified, that the petitioners recover the land and writ of possession issue.

4. The judge of the superior court directed the jury to return a verdict in favor of petitioners for

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the land in dispute, and directed them also to find that the railroad iron thereon was the property of the defendant. This latter ruling is the one complained of in the cross bill of exceptions. It appears from the record that the railroad iron referred to in the verdict was the tracks which had been placed upon the land in controversy by the railroad company as a part of its main track between its terminal points, and also side tracks used as a part of its terminals in the city of Augusta. It is apparent that these improvements were made upon the property with no intention on the part of the railroad company to improve the value of the estate, but solely for its uses and purposes in its business as a common carrier of freight and passengers. Upon the termination of the life estate, which the railroad company acquired under the conveyance from Holt, did the title to these improvements vest in the remainder-man at the same time that the title to the land vested? In the case of *Elwes v. Maw*, 3 East, 38, Lord Ellenborough reached the conclusion, after an elaborate examination of authority, that buildings and the like, erected by a tenant upon the leased premises for the purpose of agriculture, and necessary for the occupation of the farm, and the immediate profits of the land, were not removable by the tenant, even during his term, but that such improvements as were placed by the tenant upon the premises for the purposes of trade were not governed by the same rules, and were removable by the tenant at any time before the expiration of his term. This decision was followed by the supreme court of the United States in the case of *Van Ness v. Pacard*, 2 Pet. 137. The same doctrine is recognized in the case of *Carr v. Railroad Co.*, 74 Ga. 73, though what is said in that case is merely *obiter*. In *Meigs Appeal*, 62 Pa. St. 28, it appeared that during the Civil War the United States authorities erected certain buildings as military barracks and hospitals in the borough of York. After the war had ended, and the buildings were no longer used by the

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government, they were offered for sale, the purchaser to have the privilege of removing the same from the premises. The authorities of the borough applied for an injunction to prevent the removal of the buildings, alleging that they were of a permanent nature, attached to the realty, and therefore became the property of the borough, and could not be removed after the government had abandoned the use of them for the purposes for which they were erected. It was held that, the buildings thus erected being placed there at the time when the necessities of the government required the same for military purposes, when the conditions requiring their use ceased to exist the government had a right to remove the same from the premises. In the case of *Wagner v. Railroad Co.*, 22 Ohio St. 563, it was held that stone piers built by a railroad company as a part of its railroad, on lands over which it had acquired a right of way for its road, did not, though firmly imbedded in the earth, become the property of the owner of the lands as part of the realty; and that, when the railroad company abandoned the purpose of completing the railroad, it had a right to remove such structures from the premises as personal property; and the fact that the landowner had been allowed to take possession of the land embraced in the right of way, and hold it for a term of years less than is required to extinguish the easement, did not, in itself, imply a relinquishment on the part of the railroad company of its right to enter and remove the piers. In the case of *Railway Co. v. Dunlap* (Mich.) 11 N. W. 271, it was held that a railway track or other improvement, wrongfully placed upon land by a railroad company, and not abandoned to the owner of the premises, cannot be treated as a part of the realty, for the purpose of increasing its value in estimating the damages due to the owner in subsequent proceedings to condemn the land for the use of the company. In *Justice v. Railroad Co.*, 87 Pa. St. 28, it was held that, where a railroad company was a trespasser and its entry upon land not in conformity to law, structures placed upon the prop-

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erty for use by the company in its business did not pass to the landowners, and their value was not to be included in an assessment of damages in proceedings afterwards instituted to acquire the property. In *Railroad Co. v. Goodwin*, *supra*, it was held that a railroad company which had entered upon land, and constructed its road over the same, under a license from the life tenant, would not be required to pay to the person entitled to the property, after the termination of the life estate, the value of the structures which had been placed upon the property at its own expense. See, also, *Elliott, R. R.* §§ 997, 998.

In the present case, at the termination of the life estate, if the railroad company had abandoned the possession of the property without removing the improvements which it had placed thereon, such improvements would probably have passed to the remainder-man; but, under the facts of this case, where it remained in possession, using the same in discharging public duties which were incumbent upon it, although its possession would be, in some sense, wrongful as against the remainder-man, it is not to be treated, as has been shown, as a naked trespasser. It would have had the undoubted right, under the authorities above referred to, to remove from the premises the structures which it had placed thereon at any time during the existence of the life estate. As it had a right to remain upon the premises, and have their value ascertained, in order to acquire a complete title to the same, the mere fact that at the time of the assessment these improvements were still upon the property does not require that they shall be dealt with as the property of the landowner. Therefore, the petitioners having gone into a court of equity in assessing the damages which should be paid to them, the value of the improvements should not be considered. The amount which the plaintiffs would be entitled to recover would be the market value of the property at the time the life estate terminated, with interest from that date to the date of the verdict, the value of the improvements placed on the property not being considered in ascertaining such market value.

Note

5. Under the rulings we have made, the only question to be determined upon another trial of this case would be what compensation should be paid to the petitioners for the interest of the remainderman in the property. As all other questions are finally settled by this decision, direction is given that this single issue be submitted to a jury, and that they determine it in accordance with instructions given by the trial judge, following the rulings we have made. When the amount to be paid to the petitioners is thus ascertained, a decree should be entered, allowing the railway company a reasonable time in which to pay the amount thus found, and upon payment of the same, the title to the property to vest in the railway company. Upon a failure to pay the same within the time limited, the right of the company to acquire the property should be decreed to be lost, and a writ of possession should issue to enforce the judgment in ejectment already rendered in the case. Judgment on main bill of exceptions reversed, with direction; on cross bill, affirmed. All the justices concurring.

Case at Bar.

NOTE.

Eminent Domain—Damages—Improvements Made by Railroad Company before Condemnation.—It is the generally accepted rule that "just compensation" to the landowner does not include the value of any track, roadbed or bridges placed upon the land by the railroad company prior to instituting condemnation proceedings and when its acts made it a trespasser. *Texas & P. R. Co. v. Hays*, 62 Tex. 397, 23 Am. & Eng. R. Cas. 102, note 107; *Toledo, etc., R. Co. v. Dunlap* (Mich.), 5 *Id.* 378; *California S. R. Co. v. Southern Pac. R. Co.* (Cal.), 20 *Id.* 309; *Jones v. New Orleans, etc., R. Co.* (Ala.), 14 *Id.* 217; *Emerson v. Western Union R. Co.*, 75 Ill. 176; *California Pac. R. Co. v. Armstrong*, 46 Cal. 85; *Mitchell v. Illinois & St. L. R. Co.*, 85 Ill. 566; *North Hudson R. Co. v. Borream*, 1 *Stewart* (N. J.), 450; *Price v. Weehawken Ferry Co.*, 4 *Stewart* (N. J.), 31; *Justice v. Nesquehoning Val. R. Co.*, 87 Pa. St. 28; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 282; *Cohen v. St. Louis, F. S. & W. R. Co.*, 34 Kan. 158, 22 Am. & Eng. R. Cas. 116; *Oregon R. & N. Co. v. Mosier*, 14 Ore. 519; *Jones v. New Orleans & S. R. Co.*, 70 Ala. 227, 14 Am. & Eng. R. Cas. 217; *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538; *In re Morgan's Appeal*, 39 Mich. 675; *Daniels v. C. I. & N. R. Co.*, 41 Iowa, 52; *San Francisco & N. P. R. Co. v. Taylor*, 86 Cal. 246, 24 Pac. Rep. 1027; *Albion River R.*

Note

Co. v. Hessner, 84 Cal. 435; 44 Am. & Eng. R. Cas. 125; Black River & M. R. Co. v. Barnard, 9 Hun (N. Y.) 104; Louisville, N. O. & T. R. Co. v. Dickson, 63 Miss. 380; Greve v. First Div. St. P. & P. R. Co., 26 Minn. 66, 1 N. W. Rep. 816; St. Johnsbury & L. C. R. Co. v. Willard, 61 Vt. 134, 2 L. R. A. 528, 17 Atl. Rep. 38; Bellingham Bay & B. C. R. Co. v. Strand (Wash.), 3 Am. & Eng. R. Cas., N. S., 171; Jacksonville, T. & K. W. R. Co. v. Adams, 51 Am. & Eng. R. Cas. 544, 28 Fla. 631, 10 So. Rep. 465, in which case the court said "Though, as a general rule, things affixed to the freehold so as to be a part thereof become, as against a trespasser or person entering tortiously and affixing them, the property of the owner of the soil, this rule is not applicable as against a body having the power of eminent domain, and entering without leave and making improvements for the public purpose for which it was created and given such power. The principle controlling the landowner's right to damages in such cases is that he shall have compensation for the damage actually sustained by him, and no more, and that the trespasser's liability shall be likewise limited. This principle is affirmed in Mississippi, Michigan, Iowa, Illinois, Minnesota, Wisconsin, Oregon, Pennsylvania, and Alabama.

And this whether the company has been ousted from the former possession or not. Jacksonville, T. & K. W. R. Co. v. Adams, 51 Am. & Eng. R. Cas. 544, 28 Fla. 631, 10 So. Rep. 465.

Where a company commences condemnation proceedings, and while they are pending, enters, under an order of the court, and constructs its track, and the proceedings are subsequently dismissed and new proceedings instituted, in assessing the damages under the new proceedings the landowner is not entitled to the value of the improvements placed upon the land by the company. California Pac. R. Co. v. Armstrong, 46 Cal. 85, 7 Am. Ry. Rep. 259.

Where the company commences condemnation proceedings, and while they are pending, enters upon the land, under a license, and constructs a portion of the track, the landowner is not entitled to compensation for the track thus laid. *In re Norwood & M. R. Co.*, 47 Hun 489, 14 N. Y. S. R. 437.

Where a railway company, under license of the life tenant, enters upon land and constructs its road over the same, with costly embankments, and enjoys the use of the same without objection, on application by the company, after the determination of the life estate, to condemn a strip of land on which such road and structures are built, for a right of way, the law will not require it to pay the owner of the land for the structures so placed upon the same at its own expense. The landowner will have no right to compensation for such structures, they not being his property. Chicago & A. R. Co. v. Goodwin, 111 Ill. 273.

Where a company takes possession of land and constructs a track thereon, with the consent of a person in possession, under color of title, and afterward the paramount owner commences an action for the permanent taking and appropriation of the land, the company will not be considered as a mere trespasser on the land, and will not be required to pay for improvements made thereon by itself, but will be required to pay only the value of the land taken at the time it was taken, and the damages to the land not taken. Cohen v. St. Louis, Ft. S. & W. R. Co., 22 Am. & Eng. R. Cas. 116, 34 Kan. 158, 55 Am. Rep. 242, 8 Pac. Rep. 138; Ellis v. Rock Island & M. C.

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R. Co., 125 Ill. 82, 14 West. Rep. 372, 17 N. E. Rep. 62; Oregon R. & N. Co. v. Mosier, 14 Oreg. 519, 13 Pac. Rep. 300, 58 Am. Rep. 321.

But see, *contra*, *Graham v. Connersville & N. C. J. R. Co.*, 36 Ind. 463, 3 Am. Ry. Rep. 28; in which case it was held that where a railroad company has, without the consent of the owner, and without color of title, entered upon land and occupied the same, building a depot and hotel thereon, and afterward seeks to appropriate the land under authority of law, the value of the land at the time of the legal appropriation, with the improvement thereon, constitutes the amount for which the company is liable to the owner of the land; *Hendry v. Trinity & S. R. Co. (Tex.)*, 24 Am. & Eng. R. Cas. 286.

Where a company enters upon land without title, or the consent of the owner, and constructs its track, and subsequently proceeds to condemn the land, the company will be treated as a trespasser in so entering, and the landowner entitled to the increased value of the land as represented by the track and fixtures placed thereon by the company. *In re Long Island R. Co.*, 6 T. & C. (N. Y.) 298, 3 Hun 613; *In re New York, W. S. & B. R. Co.*, 37 Hun (N. Y.) 317.

In such case the increased value of the land by reason of the affixing of the track, is the measure of increased compensation; *In re Long Island R. Co.*, 6 T. & C. (N. Y.) 298, 3 Hun 613.

Taking for a way land already used for that purpose takes all things existing upon it and adapted to its use as a way, such as flagstones, gravel, bridges, culverts, etc., so that the appraisal, in such case, should be of the land with all these incidents of its condition. *Ford v. Lincoln County Com'rs*, 64 Me. 408.

The measure of the value of the betterments is not the actual cost of their erection, but the enhanced value they impart to the land, without reference to the fact that they were not desired by the true owner, or could not profitably be used by him in the prosecution of his particular business. *Carolina C. R. Co. v. McCaskill*, 98 N. Car. 526, 4 S. E. Rep. 468.

SNOUFFER

v.

CHICAGO & N. W. RY. CO. *et al.*

(*Supreme Court of Iowa, May 23, 1898.*)

Condemnation of Lot—Admissibility of Evidence of Sales of Other Lots.*—In condemnation proceedings by a railroad company, it was not error to refuse to strike out evidence as to the price paid for other lots in the vicinity, brought out by cross-examination of defendants' witness as to the basis of his opinion in regard to the value of property in the vicinity.

Damages—Instructions.—It was not error to allow the jury, in estimating the market value of the lot on the day of the taking, to

*See note at end of case.

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consider the prospective location of plaintiff's depot in the vicinity.

Same.—The following language of an instruction was not open to the objection that the jury might infer therefrom that, if they were not to deduct benefits or future accessions of value, they should add them: "and, in estimating said value (the market value at the time of taking) from all the evidence introduced on that question, you will not consider or deduct any benefit, if any you find plaintiff has derived, on account of any enhanced value that has accrued to plaintiff by reason of any contemplated building of said depot."

Same—Same.—It is not error to refuse to give an instruction when such requested instruction is embraced within the instructions given.

APPEAL by defendants from Linn county district court. *Affirmed.*

S. K. Tracy, J. C. Leonard, and Hubbard & Dawley, for appellants.

Rickel & Crocker and Jamison & Smyth, for appellee.

WATERMAN, J. It is urged that the court erred in not sustaining defendants' motion to strike from the record the testimony of one Bealer with relation to the amount other lots in the vicinity had sold for. The facts are that Bealer was a witness introduced by defendants. After giving his opinion as to the value of plaintiff's

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lot, he was cross-examined as to the basis of this opinion,—his knowledge of values in the locality. It was upon this cross-examination that he stated that he knew of sales of other lots, and gave the price paid in one instance. The testimony was admissible for the purpose for which it was offered. *Winklemans v. Railway Co.*, 62 Iowa, 11, 17 N. W. 82; *Cummins v. Same.*, 63 Iowa, 397, 19 N. W. 268. If this evidence had been offered as tending to show the value of plaintiff's lot, it would probably have been inadmissible, but this was not the case. The fact was elicited in an effort to ascertain the witness' knowledge of values. The distinction is clearly made in the last of the cases just cited.

2. The other errors assigned are of such a character that they can best be considered together. Plaintiff's

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lot was taken by the defendants April 25, 1896, and both the instructions asked by appellants and those given by the court embodied the thought that the amount to be fixed by the jury was the fair market value of said property on this date. This we regard as the correct rule. But it is claimed by appellants that the court erred in permitting witnesses who testified as to the value of the lot on that day to take into consideration the prospective location of the depot. And it is said the instructions given by the court are framed on the idea that this fact might be considered. We see no just ground of complaint as to either of these matters. Many of the considerations that tend to affect the value of town property are prospective only. Select a lot in any city, find a witness competent to express an opinion as to its value, and ask him with relation thereto, and as to the basis of his judgment, and it will be found that the facts upon which his conclusions rest are anticipatory, largely. The business district is growing or extending towards it. It is particularly suitable for manufacturing purposes, or it is in a section that is rapidly improving. These are proper matters to consider, and they all relate, in most part, to future prospects. It was right for the jury to consider every fact that tended to give value to this property on the day it was taken. And, if the fact that a depot was likely to be erected in its vicinity had given it an added worth at that time, it was proper to consider this fact, even though the depot was to be erected by the railway companies that sought to take the property. If this were an action for damages, brought by a person to whom the owner had contracted to sell this lot, we think no one would contend that the prospective location of the depot should be excluded from consideration in fixing the value of the property. The measure of its value on the date mentioned should be the same for all. See *Sanitary Dist. v. Loughran*, 160 Ill. 362, 43 N. E. 359. Our attention has been called to cases holding that the possible increase of value after the taking, because of

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the improvement, cannot be considered in fixing the value, and also to the rule that the general value of the property is the criterion, and not its value to the railway company for the special purpose designed. But we have seen no authority that contravenes the principle we have stated.

3. In the light of what has been said, we shall consider the objections made to the charge of the court. The second instruction was as follows: "You are in-

structed that the material question for you to determine is, what was the fair market value of lot 4 in block 26 in the city of Cedar Rapids, Linn county, Iowa, when it was taken by defendants, to wit, April 25, 1896? [and, in estimating said value from all the evidence introduced on that question, you will not consider or deduct any benefit, if any you find plaintiff has derived, on account of any enhanced value that has accrued to plaintiff by reason of any contemplated building of the said depot.] Nor will you consider any enhancement in value of the said lot by reason of any building or improvement defendants may have subsequently erected on the lot; and consider only the fair market value of said lot when taken by defendants, as established to your satisfaction by the evidence." The language we have inclosed in brackets is assailed. It is said the jury might well have understood that, if they were not to deduct benefits or future accessions of value, they should add them. The language of the court is somewhat obscure, as applied to the issues in this case; but, whatever else it may be said to mean, it cannot, in view of its context, be given the construction which appellant places upon it. In this particular paragraph the jury is told expressly that the measure of plaintiff's damage is the fair market value of the lot at the time it was taken, and that its enhancement thereafter in value must not be considered. And in the fourth paragraph this thought is emphasized in the following language: "In arriving at your value of this lot, you should not return a verdict based upon a speculative value, but solely at its reasonable market

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value at the time it was taken." We think, on the whole, the charge was correct, and that the defendants could not have been prejudiced by the phrase to which they except. There was no error in refusing to give the instructions asked by defendants, for the subject-matter was contained in the charge as given. The evidence as to the value of the lot is in conflict, but there is quite sufficient to sustain the amount fixed by the jury. For the reasons given the judgment will be affirmed. Same—Same.

NOTE.

Condemnation—Evidence—Admissibility.—See *St. Louis, etc., Ry. Co. v. Fowler* (Mo.), 10 Am. & Eng. R. Cas., N. S., 405, and *note* p. 419.

In condemnation proceedings, evidence as to sales of similar property by a witness, is admissible, not to show his competency as a witness, but as a test of the value of his testimony. *Davis v. Northwestern El. Ry. Co.* (Ill.), 9 Am. & Eng. R. Cas., N. S., 452. In this case the court said: "A trial court has a large discretion in the admission of evidence on this subject, and knowledge of a witness derived from actual sales is never a test of competency, but is always desired, and may be shown for the purpose of determining, not the competency of the witness, but the value to be given his testimony. *Railroad Co. v. Blake*, 116 Ill. 163, 4 N. E. 488." And in *Watson v. Milwaukee & M. R. Co.* (Wis.), 10 Am. & Eng. R. Cas. 168, 57 Wis. 332, 15 N. W. Rep. 468, the court said, "one of these objections relates to the questions put to a witness of the appellants, who had been examined at considerable length for the purpose of showing that a part of appellants' land was suitable to be laid out and platted into village lots, and as to the probable value of such lots when so laid out and platted. On the cross-examination he was asked several questions in regard to sales of lots made in the vicinity of this land previously, some of the sales having been made four or five years before the taking of the land by the railroad company. We think this kind of evidence was competent, and especially on cross-examination, to test the worth of his opinion as to the value of the lots proposed to be platted on the lands in question. The prices for which lots similarly situated had in fact been sold would be some evidence tending to show the probable value of the lots to be sold in the future. Evidence of this character, to test the value of the opinion of a witness who testifies as to the future value of land to be thereafter platted and sold in the shape of village lots, is clearly admissible. Recent sales would be the best test, but the limits within which evidence of sales may be shown is very much in the discretion of the trial judge; and this court will not find that such judge has abused his discretion upon a question of this nature unless the abuse is clearly shown. *Chandler v. Jamaica*, 122 Mass. 305; *Shattuck v. Railroad Co.*, 6 Allen, 115; *Green v. Fall River*, 113 Mass.

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262; Gardner v. Brookline, 127 Mass. 358; Presbrey v. Ry. Co., 103 Mass. 1. These cases recognize not only the propriety of this kind of evidence on the cross-examination of a witness who has given his opinion as to the value of the property in question, but as evidence in chief to disprove the correctness of the opinion of a witness who has given an opinion of the value of lands in dispute. See Benham v. Dunbar, 103 Mass. 365. In this case, evidence of the sales made in the vicinity of the lands in controversy from one to eight years before, was held admissible. Paine v. Boston, 4 Allen, 168; Railroad Co. v. Railroad Co., 3 Allen, 142; Davis v. Railroad Co., 11 Cush. 308."

STATE

v.

WRIGHTSVILLE & T. R. Co.

(Supreme Court of Georgia, June 7, 1898.)

Power of Railroad Commission to Compel Carrier to Contract for Transportation Beyond Terminus—Discrimination against Connecting Carriers.*—There is no law which confers upon the railroad commission of this state the power to compel a railroad company to make a contract for the shipment of goods beyond the terminus of its own line, or to issue a through bill of lading binding such company so to do; nor is the fact that a railroad company actually contracts for the shipment and delivery of goods beyond its own terminus to a designated point, and issues bills of lading accordingly, when the same was routed over a particular one of its connecting lines, to be treated as unjustly discriminating against another connecting line, because the company first mentioned refuses to issue through bills of lading for the shipment over the latter of goods consigned to the same point of destination.
(Syllabus by the Court.)

ERROR by plaintiff from Laurens county superior court. *Affirmed.*

J. M. Terrell, Atty. Gen., for the State.

A. F. Daley, for defendant in error.

SIMMONS, C. J. It appears from the record that the Wrightsville & Tennille Railroad Company refused to issue to some of its patrons through bills of lading beyond the terminus of its own line. Complaint of this

*See note at end of case.

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action was made by the Augusta Southern Railroad Company to the railroad commission of Georgia, and that commission cited the Wrightsville & Tennille Railroad Company to appear before it to answer the complaint. After a hearing, the commission decided that the railroad company had violated rule 32 of the commission, and ordered it to issue to its patrons through bills of lading beyond the terminus of its line. After the passage of this order, another of the patrons of the Wrightsville & Tennille Railroad Company applied to it for a through bill of lading from Bruton, a point on its line, to Tennille, thence over the Augusta Southern road to Augusta, and thence over one or more roads in South Carolina to Savannah, in this state. The Wrightsville & Tennille Railroad Company refused to issue this bill of lading, but did issue one through to Savannah over its own line and that of the Central of Georgia Railway Company. The railroad commission, through the attorney general of the state, brought this action for the recovery of a penalty of \$5,000, as provided in section 2196 of the Civil Code. The railroad company demurred to the petition on the grounds that it set out no cause of action, that the railroad commission of Georgia had no right to require of defendant company the issuing of through bills of lading to points beyond its own terminus, and that the acts complained of related to shipments of freight going beyond the boundaries of the state of Georgia, and through the state of South Carolina, before reaching their destination. The court sustained the demurrer, and the state excepted.

The point made by the pleadings is whether the railroad commission of Georgia has power, under the law, to compel a railroad to issue a through bill of lading over its line, and beyond its terminus. We have carefully read rule 32 of the commission, which is alleged to have been violated by the defendant company, and we find that it is substantially in the language of the act of 1874 codified in sections 2212-2214 of the Civil Code. If, therefore, the defendant company violated rule 32, it also violated the law as declared in

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these sections of the Code, which are as follows : "All railroad companies in this state shall, at the terminus of any intermediate point, be required to switch off and deliver to the connecting road having the same guage, in the yard of the latter, all cars passing over their lines, or any portion of the same, containing goods or freights consigned, without rebate or deception, by any route, at the option of the shipper, according to customary or published rates, to any point over or beyond such connecting road, and any failure to do so with reasonable diligence, according to the route by which such goods or freights were consigned, shall be deemed and taken as a conversion in law of such goods or freights, and shall give a right of action to the owner or consignee, for the value of the same, with interest, and not less than ten per cent., nor more than twenty-five per cent., for expenses and damages : provided, that should the defendant, in any suit brought under this section, set up as a defense that the plaintiff has accepted a rebate, or practiced fraud or deception touching the rate, it shall be a complete reply to such defense if the plaintiff can prove that defendant, or its agents, have allowed a rebate or rebates, or practiced like fraud or deception from the same competing point against the rival line." "Where any railroad in this state joins another at any point along its line, or where two of such roads have the same terminus, either line, having the same guage, may, at its own expense, join its tracks by proper and safe switches with the other, should such other road or company refuse to join in the work and expense." "No railroad company shall discriminate in its rates or tariff of freights in favor of any line or route connected with it as against any other line or route, nor, when a part of its own line is sought to be run in connection with any other route, shall such company discriminate against such connecting line or in favor of the balance of its own line, but shall have the same rates, and shall afford the usual and like customary facilities for interchange of freights to patrons of each and all routes or lines

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alike; any refusal of the same shall give a like right of action as mentioned in section 2212 of this Code." Section 2212, it will be observed, simply requires railroad companies, at the terminus or any intermediate point, to switch off and deliver to the connecting road of the same gauge all cars passing over their lines which contain goods or freight consigned by any route, according to customary or published rates, to any point beyond such connecting road. Section 2213 allows one railroad company, at its own expense, to join its tracks by switch with another. It is clear that neither of these sections confers upon the railroad commission the power to compel railroad companies to issue through bills of lading. In the petition in this case there is no complaint that the defendant railroad company refused to deliver to the Augusta Southern Railroad Company freight consigned to it, or to allow the Augusta Southern Railway Company to join its tracks to the tracks of defendant company, or to allow the Augusta Southern Railroad Company to draw its cars from its own tracks to those of defendant company, or *vice versa*. Had any of these complaints been made, the case of *Logan v. Railroad Co.*, 74 Ga. 684, relied upon by the attorney general, would have been applicable; but that decision, in our opinion, does not apply to the facts of the case under consideration any more than it did to the facts of *Coles v. Railroad Co.*, 86 Ga. 251, 12 S. E. 749. In the case of *Logan v. Railroad Co.*, the railroad company refused to receive freight in cars from another road, and the owner of the freight was compelled to haul it in drays from one road to the other.

Proceeding now to a consideration of section 2214 of the Civil Code, it will be seen that this section prohibits one railroad company from discriminating "in its rates or tariff of freights in favor of any line or route connected with it as against any other line or route," and declares it shall have the same rates for all lines, "and shall afford the usual and like customary facilities for interchange of freights to patrons of each and all routes or lines alike." In our opinion these words do not confer

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upon the commission the power to compel railroad companies to make contracts. They refer to the reception of freight by one railroad from another, or its delivery from one to another. It allows patrons of a railroad to designate the route over which they desire their goods to be shipped, and if they so desire, to send them over roads connecting with the receiving road. To illustrate by the facts of this particular case: Beall seems to have preferred to ship his cotton from Bruton, on defendant's line, to Tennille, the terminus of the line; thence over the Augusta Southern to Augusta, Georgia; thence through South Carolina, by connecting roads, to Savannah, in this state. This clause of the act prohibited the Wrightsville & Tennille Railroad Company from interfering with the execution of this preference. Under this clause the defendant company could have been compelled to receive Beall's cotton, transport it to Tennille, and deliver it to the Augusta Southern Railroad Company. The latter road would have been compelled to receive it and transport it to Augusta. Had Beall had a car load of cotton, and had the defendant company agreed for it to be shipped through in its car, the Augusta Southern Railroad Company would have been compelled to receive the car and transport it over its road. Beall did tender the two bales of cotton to the defendant company, and the latter was bound to receive it and deliver it to the connecting road. This is the meaning of the act of 1874, codified in the above-cited sections of the Code, and these are the "usual and like customary facilities" to be afforded by a railroad to shippers. In this view we are strengthened by the ruling of the railroad commission of Georgia in the case of Georgia Chemical Works v. Richmond & D. R. Co., 20 R. R. Com. Rep. 175. It appears from the report of that case that the Georgia Chemical Works shipped from Augusta two carloads of fertilizers to a customer at Harmony Grove, Ga. These cars were routed over the Georgia Railroad to Athens; thence *via* Athens belt line over the Northeastern Railway to desti-

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nation. Upon their arrival at Athens the Richmond & Danville Railroad, the lessee of the Athens Belt Line, the connecting road between the Georgia Railroad and the Northeastern Railroad, refused to transmit the cars but side-tracked them ; assigning as their reason for so doing that the Athens Belt Line was a competing road. Complaint was made to the railroad commission of Georgia; and FORT, C., in his opinion, said, in substance, that the commission had no jurisdiction of the matter, because it had adopted no rule providing for such a case. After quoting the various statutes upon the subject, he held that the shipper would have a right of action against the railroad company for a violation of the act of 1874, but that the public had no right at that time to enforce that act through the commission. He said : "The two great purposes in the commission act were the prevention of extortion and unjust discrimination. This covers a wide field, of necessity ; for it contemplates the making of just and reasonable freight and passenger rates, and the framing of suitable and just rules and regulations to prevent unjust discriminations." He then cites the fifth section of the act of 1879, which we cite hereafter, and adds : "It will be seen that this section provides for the regulation of rates, the regulation of charges for handling and delivering freights, and for making rules and regulations to prevent unjust discriminations in the transportation of freights. The latter clause provides expressly for preventing unjust discrimination in transporations. What kind of unjust discriminations were referred to? It will be remembered in 1874, long prior to the commission act, the legislature had sought to prevent the very kind of discrimination here complained of, and had given a right of action wherever it was practiced. It is therefore obvious that this very discrimination was in the mind of the legislature at the time the commission act was passed, and that this section intended to confer upon the commission power to protect the public from discriminations of this character. The personal right of action was already secured.

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This grant of power authorized the commission to give protection to the public. It cannot be said that it was the purpose of the legislature to remit parties injured by such unjust discriminations for their legal redress to the courts only. It was also intended to give the cumulative remedy of appealing to the commission, just as in the case of an overcharge of freights. There the party has a complete remedy in the courts, yet the commission rightfully assume jurisdiction over these matters, and compel the railroads to refund overcharges promptly to the parties. The courts give relief to the individual for the private wrong suffered. The commission should supply a remedy for the public by prescribing a just and reasonable rule on the subject. The individual can recover his damages. The public can be protected by the imposition of a penalty. In the present case, therefore, I am of the opinion that the Georgia Chemical Works must resort to the courts for redress; but I earnestly recommend the commission to make just and reasonable rules and regulations on this subject, to prevent a recurrence of like wrongs in the future." A note to the opinion adds that in consequence of the recommendation the commission promulgated circular 208, adopting rule 32. The opinion and recommendation of Commissioner Fort show the intention of the commission in adopting this rule. It was to prevent discriminations such as were complained of by the Georgia Chemical Works, and was to fit the case of a railroad which refused to receive or deliver freight, or to give to patrons the usual and customary facilities for the interchange of freights from its line to another.

We are clearly of the opinion that the act of 1874 was not intended by the legislature to compel a railroad company to make a contract against its will. Nor does the fact that this defendant railroad company had issued through bills of lading over the Central of Georgia Railway to Savannah justify the commission in deciding that it was an unjust discrimination against the Augusta Southern Railroad Company to refuse to is-

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sue through bills of lading over that road. By the passage of the act of 1879 creating the railroad commission, the legislature intended to prohibit and prevent unjust discriminations in regard to freight rates and passenger tariffs. The title of that act shows that this is true: "An act to provide for the regulation of railroad freight and passenger tariffs in this state, to prevent unjust discrimination and extortion in the rates charged for transportation of passengers and freights, and to prohibit railroad companies, corporations and lessees in this state from charging other than just and reasonable rates, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto; and to appoint commissioners, and to prescribe their powers and duties in relation to the same." If the defendant company had issued through bills of lading to Savannah over the Central of Georgia Railway, this was on its part a voluntary act. It had the power, under its charter, to make such a contract; and it would be liable for any damages or loss occasioned to the goods shipped under such contract, whether occurring on its own road or upon its connecting line. The voluntary act of one party in making a contract is quite different from the involuntary act of the same party in making a like contract under duress or compulsion; and, as before remarked, the voluntary act of issuing a through bill of lading over the Central of Georgia Railway cannot be construed into an act of discrimination against the Augusta Southern Railroad Company, there being no complaint of any difference in rates, any refusal to deliver freight to the connecting road or to transfer cars, or things of that sort. The law of this state being that the railroad company which issues a through bill of lading is bound for any loss or damage sustained by the goods on its own road or the connecting line, unless it makes an express contract in writing with the shipper, we can clearly perceive that this defendant company might be willing to issue a through bill of lading over one road, and unwilling to issue it over another. The one road might be perfectly

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solvent, and willing to pay for the loss or damage to the goods which might occur on its line, while the other might be insolvent, and unwilling and unable to pay for such loss or damage. The defendant company might be willing to trust its cars to the one road, and not to the other. In this case the Wrightsville & Tennille Railroad Company might have been willing to give a through bill of lading over the Central of Georgia Railway Company's line for the two bales of cotton because of its confidence in the ability and willingness of the Central of Georgia Railway Company to pay for any damage the cotton might sustain upon its line. It might have been unwilling to issue a through bill of lading over the Augusta Southern Railroad, the connecting lines in South Carolina, and on to Savannah. While it might have had confidence in the ability and solvency of the Augusta Southern Railroad Company, it might have had no such confidence in the South Carolina railway companies. If litigation ensued in regard to the cotton, the Central of Georgia Railway Company or the Augusta Southern Railroad Company could have been sued in this state. If the damage or loss occurred in South Carolina, the litigation must have been conducted in the courts of that state. Rule 32 of the railroad commission being but a synopsis of the act of 1874 as embodied in the Code, we are clear in our opinion that the refusal of the defendant company to issue a through bill of lading did not violate either the rule, or the act upon which it was predicated.

It is claimed by the attorney general that, if the commission had no power, under the act of 1874, to compel a railroad company to issue a through bill of lading, it had that power under the fifth section of the act of 1879, above cited. We have seen, from the title of that act, copied above, that its object was to regulate railroad rates and tariffs, and to prevent unjust discriminations in the rates and charges for transportation, and to prohibit railroad companies from charging other than just and reasonable rates, to appoint com-

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missioners, and to prescribe their powers in relation to the same. This is the power intended to be given by that act. The fifth section of the act reads as follows : "That the commissioners appointed as hereinbefore provided shall, as provided in the section of this act, make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this state on the railroads thereof; shall make reasonable and just rules and regulations, to be observed by all railroad companies doing business in this state, as to charges at any and all points, for the necessary handling and delivery of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers on the railroads in this state; shall make reasonable and just rates of charges for use of railroad cars carrying any and all kinds of freight and passengers on said railroads, no matter by whom owned or carried; and shall make just and reasonable rules and regulations to be observed by said railroad companies on said railroads, to prevent the giving or paying of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers," etc. Laws 1879, p. 127. The attorney general relies upon the words, "shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers." These words, read in connection with the context and with the title of the act, clearly mean that the commission should have power to prevent unjust discrimination in rates and charges, and to make rules for this purpose. As we have shown above that issuing a through bill of lading over one connecting road, and refusing to issue it over another, is not an unjust discrimination, within the meaning of the words used in the act, these words cannot be construed into meaning that the commission can adopt rules compelling a railroad to issue through bills of lading

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over another road. This action was brought under that section of the Code which allows the state to recover the penalty for a violation of the rules of the commission. It is therefore a penal action, and it is well settled that statutes allowing such actions must be strictly construed. Thus construing the acts above dealt with, and the rule of the commission, it is clear that the defendant company did not violate either the acts or the rule in refusing to issue a through bill of lading over the line of the Augusta Southern Railroad Company. Judgment affirmed. All the justices concurring.

NOTE.

Whether Railroads Can Be Compelled to Make Contracts for Transportation Beyond Their Own Lines.—The duty of any carrier to receive goods tendered by a connecting carrier does not extend so far as to require it to enter into a contract with the latter for a joint through rate and a joint through routing of freight and passengers, and a court of equity has no power, either at common law or under the interstate commerce act, to compel one company to enter into such a contract with another. *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 559, 42 Am. & Eng. R. Cas. 490; *Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co.*, 3 I. C. C. Rep. 1.

"At common law a carrier is not bound to carry except on his own line, and we think it quite clear that, if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ." *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, 16 Am. & Eng. R. Cas. 57, reversing 15 Fed. Rep. 650. See also *Pullman Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 23 Am. & Eng. R. Cas. 537; *Chicago, etc., R. Co. v. Pennsylvania R. Co.*, 1 I. C. C. Rep. 86; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567; *Chicago, etc., R. Co. v. Osborne*, 52 Fed. Rep. 915; *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 63 Fed. Rep. 775; *St. Louis Drayage Co. v. Louisville, etc., R. Co.*, 65 Fed. Rep. 39; *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 838.

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v.

AUGUSTA SOUTHERN R. CO.

(*Supreme Court of Georgia, June 11, 1897.*)

Consolidation—Effect of.*—Where by reason of the consolidation of two corporations, one of them goes entirely out of existence, and no arrangements are made respecting the liabilities of the one which ceases to exist, the corporation resulting from such combination will, as a general rule, be entitled to all the property, and answerable for all the liabilities, of the corporation thus absorbed.

Same—Liabilities.—Where a statute authorizes the consolidation of two railroad companies "upon such terms as may be agreed upon," and does not declare how the existing liabilities or obligations of either shall be settled or performed, and a consolidation thereunder between two such companies is effected by a written contract providing for the absorption of one of them by the other, but making no provision at all for a certain class of liabilities existing against the absorbed company, these liabilities become binding upon the new or surviving company,—at least, to the extent of the assets of the absorbed company, or of its ability to perform the contracts out of which such liabilities arose.

Same—Contracts of Carriage.—Where an agreement between two such companies, designated, respectively, as the "first party" and the "second party," in effect provided that the second party should cease to exist, and that all its property, rights, and franchises should go to the first party, and stipulated that "the first party hereby assumes the payment of all and every indebtedness and liability of the second party; it being understood, and the second party hereby covenanting, that there are no liabilities for unsecured debts, and that the only secured debt and liability is its bonded debt,"—*held*, that such an agreement did provide for the performance of contracts of carriage embraced in mileage or trip tickets which had been issued by the second party, and it was incumbent on the new company to carry out such contracts as if they had been made by itself.

Same—Expulsion of Passenger—Right of Action.—The expulsion from a passenger train of such new company of a person who presented for passage a ticket of this kind, which had not expired by limitation, was wrongful, and gave him a right of action against such new company.

(Syllabus by the Court.)

ERROR by plaintiff from Washington county superior court. *Reversed.*

*See notes at end of case.

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B. I. Rawlings, Evans & Evans, and Jas. K. Hines,
for plaintiff in error.

Leonard Phinizy, for defendant in error.

FISH, J. 1. It is essential to a proper determination of the present controversy to enter into a brief discussion concerning the legal status of a railway company which, under authority of law, has been formed by the consolidation of two separate and independent corporations, whereby one of them is merged into the other, and thus entirely loses its corporate existence. We cannot hope to better present the law governing in a case such as the one at bar than by quoting at length from the able and exhaustive treatise on this subject to be found in 1 Thomp. Corp. This distinguished author says: "As a general rule, the new company succeeds to the rights, duties, obligations, and liabilities of each of the precedent companies, whether arising *ex contractu* or *ex delicto*. The charter powers, privileges, and immunities of the corporations pass to, and become vested in, the consolidated company, except so far as otherwise provided by the act under which the consolidation takes place, or by other applicatory constitutional or legislative provisions. As the power to amalgamate with another corporation is in the nature of a privilege or franchise, the legislature may grant it on terms. It may require, as a condition of the grant, the new company to assume liabilities of the old corporations; and in most cases, no doubt, statutes authorizing the consolidations so provide in express terms. The mere fact that a corporation is created with the same name and with the same franchises as those possessed by a preceding corporation does not make it a continuation of the preceding corporation, and liable for its debts. But where the legislature authorizes the surrender of the charter of one company and its incorporation into another existing company, in such a sense that the latter company succeeds to the property, rights, and privileges of the former, and becomes merely its successor, it will be bound for its liabilities." See section

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fact of.

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365. "Where the new corporation is thus made the heir, so to speak, of the obligations of the old, if the new company refuses to carry out such an obligation the obligee can maintain an action against it for the resulting damages." *Id.* § 382. "After the consolidation the new company becomes liable to perform the public duties required of the precedent companies ; and, if no part of the franchise is reserved to either of the old companies, they will not be liable to the public for the nonperformance of the duties thus devolved on the new company. The duties which railroad companies owe to the public, and which are the considerations upon which their privileges are conferred by the legislature, cannot be cast off by an agreement between such companies and other persons or corporations. Therefore so much of a contract for the consolidation of two railway companies as operates to prevent a faithful discharge by the new company of its public duties is void, as against public policy." *Id.* § 386. And, to the same effect, see 4 Am. & Eng. Enc. Law, 272n. As will be seen from an examination of the numerous decisions cited by JUDGE THOMPSON in support of his text, the law bearing upon the points dealt with is now well settled. That "a railroad company which succeeds the rights and privileges conferred upon another by its charter becomes also subject to the same liabilities" imposed upon it was distinctly held by this court in *Railroad Co. v. Boring*, 51 Ga. 582. Further discussion on this line would therefore be unprofitable.

2. In this state it is provided by legislative enactment that "any railroad company incorporated under the provisions of" the general law for the incorporation of such companies shall have authority to "sell, lease, assign or transfer its stock, property and franchises to, or to consolidate the same with, those of any other railroad company incorporated under the laws of this or any other state or of the United States, whose railroad within or without this state shall connect with or form a continuous line with the railroad of the company incorporated under this law, upon such terms as may be agreed upon."

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See Code 1882, § 1689z ; Civ. Code, § 2179. The legislature has not, however, undertaken expressly to provide how the existing liabilities of, or obligations resting upon, the respective companies entering into a consolidation, shall be settled or performed. Precisely what is meant by declaring that such a consolidation may be effected "upon such terms as may be agreed upon" is not clear. Obviously, however, the phrase quoted is not to be understood as authorizing an agreement between two companies, the effect of which would be to transfer to one of them all the property and franchises, and to invest it with all the rights, privileges, and immunities, of the other, free from all the liabilities, duties, and obligations which the latter company owed to private individuals, or to the public at large. To thus allow it to be stripped of all its assets, and even its right to exist, without, at the same time, making proper provision for the payment of its debts and the performance of its duties and obligations by the company which succeeded it, would be directly opposed to public policy, as tending utterly to defeat the objects for which such corporations are chartered. 1 Thomp. Corp. § 386. It would therefore be much more reasonable to assume that the legislature intended that "such terms as may be agreed upon" are to settle, as between the two companies themselves and their respective stockholders, the rights and liabilities of each, but as to third persons not participating in the negotiations, and not parties to the contract, the law as previously announced in *Boring's Case*, *supra*, shall apply, and the company which succeeds to the charter rights and privileges conferred upon the other is to be regarded as at the same time becoming responsible for all its debts and liabilities. But granting, for the sake of the argument, that our general assembly intended to declare that in any event a contract entered into between two railroad companies, looking to the consolidation of their lines, should be considered conclusive as to the rights of third persons, it cannot for a moment be contended that it was ever so remotely

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contemplated that the two contracting parties should have power to enter into an agreement opposed to public policy. It would clearly be contrary to public policy to permit them to agree practically to repudiate the debts, liabilities, and obligations due by the company to be merged into the other; for our constitution expressly declares that the legislature cannot itself pass any "law impairing the legislation of contracts," and it, of course, follows that a statute seeking to empower a private person to do what amounts to the same thing would be equally objectionable and invalid. Where no "consolidation" is really affected, as where neither of two railway companies surrenders its franchises or conveys away all of its property, doubtless a contract between them whereby one merely leases the property of the other, or purchases only an inconsiderable portion of the same, would not have the legal effect of charging the former with debts and liabilities of the latter not expressly assumed. But, be this ^{Same—Liabilities.} as it may, it is, on the other hand, certainly true that where a consolidation actually takes place between two such companies, under a written contract providing for the absorption of one of them by the other, but making no provision at all for a certain class of liabilities existing against the company which thus goes entirely out of existence, these liabilities, by operation of law, become binding upon the new or surviving company,—at least to the extent of the assets of the absorbed company, or of its ability to perform the contracts out of which such liabilities arose. To this extent the successor to the company absorbed would be responsible, even in the absence of any statutory liability; for "where several corporations are united in one, and the property of the old companies is vested in the new, the latter is liable in equity for the debts of the former,—at least, to the extent of the property received from them. * * * The governing principle here is that a corporation cannot give away its assets, to the prejudice of its creditors, but that a court of equity will follow such assets, as a trust fund, into the

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hands of any new custodian; the same not being a creditor or *bona fide* purchaser. It is scarcely necessary to add that in such a case the consolidated corporation holds the property received from the absorbed company with notice of any trust attaching to it in favor of its creditors, and cannot claim the rights of a *bona fide* purchaser without notice." 1 Thomp. Corp. § 375.

3. In the written contract now under consideration the Augusta Southern Railroad Company was designated as the "first party," and the Sandersville & Tennille Railroad Company as the "second party." This instrument recited that it was expressly agreed "that the second party shall be consolidated with the first party by being merged into, and becoming a part and portion of, the first party, under the present name and title of the first party, to wit, the Augusta Southern Railroad Company; and, except for the purpose of carrying out the terms of this agreement, and receiving and distributing to its stockholders the securities hereinafter provided to be issued to them, and of executing any further instrument which may become necessary to effectuate the intent of this agreement, the said second party shall cease, determine, and no longer exist; and, in order that the merger herein provided for shall be effectual, the second party hereby sells, assigns, and transfers to the first party all its right, title, and interest in and to all and any property, real, personal, and mixed, which it has in possession, action, or expectancy, or to which it may in any wise succeed, and in and to all its franchises, privileges, and immunities now possessed by it, and agrees to surrender and deliver to the first party all the bonds, stocks, and certificates therefor which it has heretofore issued; and the first party here assumes the payment of all and every indebtedness and liability of the second party; it being understood, and the second party covenanting, that there are no liabilities for unsecured debts, and that the only secured debt and liability is its bonded debt of \$7,454.00." Referring to the last clause of the

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extract just quoted, counsel for the defendant in error, in a written argument presented by him, says: "The court will observe that by the terms of the agreement of consolidation the Augusta Southern Railroad Company did not assume to honor the tickets of the old Sandersville & Tennille Railroad Company, but only undertook to pay off and discharge the bonded indebtedness of \$7,454; it being expressly understood and agreed in said contract that there were no unsecured liabilities, and that the only secured debt and liability was the bonded debt of \$7,454 of the old Sandersville & Tennille Railroad Company." If, as counsel thus insists, it was the purpose of the contracting parties to limit, as to third persons, all liability on the part of the Augusta Southern Railroad Company, save as to the bonded debt referred to, we would have no difficulty in holding that this stipulation was void, as against public policy; for, as hereinbefore pointed out, where one railway company succeeds to all the property and franchises of another, and the latter thereupon ceases entirely to exist, the surviving corporation necessarily becomes responsible for the faithful performance of all obligations which the absorbed company has, by the surrender of its charter, rendered itself unable to meet. Indeed, it would never do to hold that our statute contemplated that a railway company thus merged into another could, by representing and covenanting that there were no obligations whatever it was under a duty to perform, practically repudiate its existing liabilities, and in this manner relieve its successor of all responsibility therefor. We do not, therefore, feel we would be justified in holding that it was the purpose of the Augusta Southern Railroad Company to assume only the bonded indebtedness in question. Had this been the purpose of the contracting parties, there would have been no occasion whatever for them to introduce into their contract the express stipulation that "the first party hereby assumes the payment of all and every indebtedness and liability of the second party." Certainly, if it was merely

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intended that the first party should assume payment of the bonded debt, it would seem that the contract would have recited simply this, and nothing more. The language actually employed contradicts and negatives any such interpretation as that suggested by counsel. Much more likely is it that the Augusta Southern Railroad Company recognized that it would be legally bound to faithfully discharge "all and every indebtedness and liability of the second party," in the event the consolidation was effected, and merely insisted upon the covenant as to the extent of such "indebtedness and liability" with a view to being reimbursed by the absorbed company, or its stockholders, should claims other than the bonded debt be presented by third persons, for which it (the covenantee) might be held legally responsible. Clearly, if the first party to the contract meant absolutely nothing by expressly stipulating that it thereby assumed "the payment of all and every indebtedness and liability of the second party," why should the first party have insisted upon a covenant by the second party reciting that there were "no liabilities for unsecured debts, and that the only secured debt and liability [was] its bonded debt of \$7,454.00"? Unless recognizing its legal obligation to pay other claims, the first party could not have felt in the least concerned as to whether there were or were not liabilities other than the bonded debt, secured or unsecured; and there would have been no reason at all for the second party entering into a covenant regarding the extent of its indebtedness and liabilities, if it was not contemplated that the first party should assume, or ever be called upon by third persons to discharge, any liability save that specifically mentioned. Were this otherwise, however, it would certainly be safe to hold, as we do in the present case, that the Sandersville & Tennille Railroad Company did not, by its covenant that there were "no liabilities for unsecured debts, and that the only secured debt and liability [was] its bonded debt," undertake to guaranty that there were no outstanding mileage or trip tickets which that com-

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pany had previously sold, and which it was legally bound to honor on presentation. The duty thus resting upon it of carrying as passengers the holders of such tickets cannot be characterized as an "unsecured debt" for which it was liable, or as a "secured debt and liability." The latter phrase comprehends something more than a mere right to sue for damages in the event of a breach of a simple contract calling for the performance of specified services. A "debt," secured or unsecured, is "a liquidated demand" for "a sum of money due by certain and express agreement," or, in other words, "a sum of money reduced to a certainty, and distinguished from a claim for uncertain damages." And. Law Dict. 315. True, in the event the Sandersville & Tennille Railroad Company wrongfully refused to honor its contracts of carriage, it would become liable in damages; but, until such unliquidated claims could be reduced to judgment, they would in no legal sense be debts outstanding against it. See *McElhaney v. Crawford*, 96 Ga. 174, 22 S. E. 895. Granting, therefore, that the Augusta Southern Railroad Company did not, under the terms of its contract, become bound to pay any class of claims covered by the covenant of the Sandersville & Tennille Railroad Company, it would follow that, even in a controversy between the contracting parties themselves, the latter company could not be held to have covenanted that it had fully carried out all contracts of carriage with respect to freight or passengers which it had previously entered into. This being so, when the surviving corporation succeeded to the rights and franchises of the absorbed company, it certainly, in the absence of any express stipulations to the contrary contained in the agreement of consolidation, became incumbent upon such surviving corporation to faithfully discharge all duties which its predecessor was under an obligation to perform with respect to contracts of carriage entered into by it with its patrons; for, under such circumstances, the general rule stated in the first division of this opinion would apply, irre-

Same—Contracts
of Carriage.

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spective of the question whether, under the terms of our statute, it would in any event be within the power of the contracting parties to limit, as to third persons, the liability assumed by the new or surviving company relative to obligations previously resting alone upon the company surrendering its corporate existence.

4. If legally bound to honor outstanding tickets regularly issued by the Sandersville & Tennille Railroad Company prior to the consolidation, a refusal on the part of the Augusta Southern Railroad Company so to do would necessarily subject it to liability as a common carrier. The plaintiff was shown to be the holder of such a ticket, which had not expired by limitation, and therefore occupied the footing of a passenger, in presenting himself for carriage. *Boring's Case*, *supra*. His expulsion from the defendant's train was wrongful, and his right to maintain an action for damages sounding in tort is not to be questioned. Judgment reversed.

Same—Expulsion of
Passenger—Right
of Action.

NOTES.

Effect of Consolidation of Railroads on Existing Liabilities—Contracts.—When two or more corporations are consolidated into a new corporation with a new name, and the constituent corporations go out of existence, if no arrangements are made respecting their property and liabilities the consolidated corporation will be answerable for their liabilities. *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587; *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587; *Columbus, etc., R. Co. v. Skidmore*, 69 Ill. 566; *Indianapolis, etc., R. Co. v. Jones*, 29 Ind. 465; *Louisville, etc., R. Co. v. Boney*, 117 Ind. 501; *Berry v. Kansas City, etc., R. Co.*, 52 Kan. 774, 39 Am. St. Rep. 381; *Thompson v. Abbott*, 61 Mo. 176; *Houston & T. C. R. Co. v. Shirley*, 4 Am. & Eng. R. Cas. 443; *Mississippi Valley R. R. Co. v. Chicago, etc., R. R. Co.*, 8 Am. & Eng. R. Cas. 575; *Sappington v. L. R. M. R. & T. R. R. Co.*, 11 Am. & Eng. R. Cas. 330; *Miller v. Lancaster*, 5 Coldw. 513; *Northern Central R. R. Co. v. Drew*, 3 Woods, 391; *Indianola R. R. Co. v. Fryer*, 11 Am. & Eng. R. Cas. 324.

In some jurisdictions it is held that such liability attaches to the new corporation, to the extent at least of the property acquired from the constituent corporation. *Barksdale v. Finney*, 14 Gratt. (Va.) 338; *Brum v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 140; *Harrison v. Arkansas Valley R. Co.*, 4 McCrary (U. S.) 264.

In some States it is held that in such case there is no implied assumption of liability. In order to render the consolidated company

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liable, it must either have expressly assumed the liability or it must have been imposed by statute. *Shaw v. Norfolk & C. R. Co.*, 16 Gray, 407; *Prouty v. Lake Shore & Michigan S. R. Co.*, 52 N. Y. 363; *Powell v. Northern Missouri R. R. Co.*, 42 Mo. 63; *Columbus, etc., R. Co. v. Skidmore*, 69 Ill. 566. And see *Selma, etc., R. R. Co. v. Hardin*, 40 Ga. 709; *Bruffett v. St. W. R. R. Co.*, 25 Ill. 357; *Selma, etc., R. R. Co. v. Hardin*, 40 Ga. 709; *Tyson v. Wabash St. L. & P. R. Co.*, 13 Am. & Eng. R. Cas. 334.

Same—Torts.—This rule includes a liability for the torts of the constituent corporations. *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Warren v. Mobile, etc., R. Co.*, 49 Ala. 582; *St. Louis, etc., R. Co. v. Marker*, 41 Ark. 542; *Selma, etc., R. Co. v. Harbin*, 40 Ga. 706; *Montgomery, etc., R. Co. v. Boring*, 51 Ga. 582; *Coggin v. Central R. Co.*, 62 Ga. 686, 35 Am. Rep. 132; *Indianapolis, etc., R. Co. v. Jones*, 29 Ind. 465; *Paine v. Lake Erie, etc., R. Co.*, 31 Ind. 283; *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48; *Cleveland, etc., R. Co. v. Prewitt*, 134 Ind. 557; *Berry v. Kansas City, etc. R. Co.*, 52 Kan. 759, 39 Am. St. Rep. 371; *State v. Baltimore, etc., R. Co.*, 77 Md. 489; *Langhorne v. Richmond R. Co.*, 91 Va. 369.

HOUSTON & T. C. R. Co.

v.

ROWELL.

(Supreme Court of Texas, June 13, 1898.)

Action for Personal Injuries—Damages—Instruction*—In an action for personal injuries, the charge that plaintiff could recover on account of expenses incurred because of such injuries, would have been correct had the word "reasonable" been inserted before the word "expenses," and had it limited his right to recovery on such account to the expenses set out in the petition.

ERROR by defendant to court of civil appeals of First supreme judicial district. *Affirmed on remittitur.*

Frank Andrews, for plaintiff in error.

Brown & Lane, for defendant in error.

GAINES, C. J. The defendant in error brought this suit against the plaintiff in error to recover damages for personal injuries. He obtained a judgment, which was affirmed upon appeal. Since it is our purpose to dis-

*See note at end of case.

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cuss but one point, it is not necessary to make any general statement of the case. With reference to the expenses incurred by him by reason of his injuries, the plaintiff testified as follows: "I am not certain of the amount of expense I was put to on account of my injuries, but it was not less than \$100. My doctor's bill was \$49; my board bill, \$45. I paid a doctor at Lagrange, after I left Paige, \$8, and other money for medicine." Upon the measure of damages the court gave the jury the following instruction: "If you find for the plaintiff, in estimating and assessing the actual damages, if any, he may have sustained, you will consider the evidence showing the mental and physical suffering he has endured, the expense he has incurred or became liable to pay, the loss of time while disabled and under treatment, and the permanent diminution of his ability to work and earn money, if you so find." We think this charge was erroneous. It was only for such expenses resulting from his injuries as were reasonable and necessary that the plaintiff was entitled to recover. It may be that, if the jury had been instructed to allow only such expenses as the plaintiff became liable to pay, the proposition contained in the charge would have been correct; and, if a more specific instruction had been desired, it should have been requested. In the absence of some proof of an express promise to pay a particular sum, the plaintiff would have been liable only for reasonable compensation for such services as were rendered to him. However, we do not decide the point. The charge in question goes further, and instructs the jury, in effect, to allow the plaintiff for "the expense he has incurred." He testified distinctly that he had paid a physician at Lagrange \$8. It is clear that this expense he had incurred. We think, also, that the jury may have inferred that he had paid the board bill. He says: "My doctor's bill was \$49; and my board bill, \$45." He seems to refer to them, not as existing charges, but as charges which had existed, but which had been paid. There was no evidence that the board bill, or the amount paid to the

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physician at Lagrange, was reasonable ; and hence the case comes within the rule followed in *Wheeler v. Railway Co.* (Tex. Sup.) 43 S. W. 876, and the cases there cited. But it is insisted on behalf of defendant in error that, since the only expense claimed in the petition was the account of Dr. Page for \$49, the error was harmless. But we think this is but an additional reason why the charge should be held erroneous. Probably, if the instruction had limited the recovery to the expense claimed in the petition, there would have been no error. But the prayer of the petition was, "judgment for his [plaintiff's] damages as above set out:" and it is clear that the charge, as construed by us, permitted a recovery for expenses not claimed in the petition. The charge of the learned judge is most commendable for its clearness and brevity, and it is to be regretted that his attention was not called upon the trial to the state of the pleadings and evidence with reference to the expenses incurred by the plaintiff.

The other points raised in the court of civil appeals (45 S. W. 763) were satisfactorily disposed of in that court, and need not be discussed.

Counsel for defendant in error offer, in case we find that there was error in the charge as claimed in the assignment discussed by us, to remit a sum sufficient to eliminate the two items of expense not proved to be reasonable. We therefore affirm the judgment, less the sum of \$53. The defendant in error will pay the costs of the appeal and of the writ of error.

NOTE.

Action for Personal Injuries—Recovery of Expenses.—Expenses for medical treatment in order to be recoverable must have been reasonably made, and be reasonable in amount. *Hewitt v. Eisenbart*, 36 Neb. 794; *Reynolds v. Niagara Falls*, 81 Hun (N. Y.) 353; *Hart v. Charlotte, etc., R. Co.*, 33 S. Car. 427; *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174.

In cases of personal injuries, in order to recover for medical attendance and similar items it is necessary for the plaintiff to show two facts: First, what expenses he has actually incurred; second, that such expenses were reasonably incurred. It is not the reasona-

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ble charge for medical services which he may recover, but the expense to him of such services not to exceed their reasonable value. *IRVINE, C.*, in *Golder v. Lund*, 50 Neb. 867.

The measure of damages in such cases is not the sum actually expended, but a reasonable amount for such purpose. *Golder v. Lund*, 50 Neb. 867; *Hewitt v. Eisenbart*, 36 Neb. 794; *Friend v. Ingersoll*, 39 Neb. 717; *Gulf, etc.*, *R. Co. v. Campbell*, 76 Tex. 174.

On the question of the reasonable value of medical services rendered, evidence of physicians living in the vicinity of the plaintiff's residence is competent to show what the services of the attending physician were worth. *Atchison v. Rose*, 43 Kan. 605.

It has been held that proof simply of the amount paid for medical attendance is not sufficient to warrant a recovery in damages for such expenditures, unless it is also established that such expenses were reasonably incurred. *Hewitt v. Eisenbart*, 36 Neb. 794; *Friend v. Ingersoll*, 39 Neb. 717; *Golder v. Lund*, 50 Neb. 867. And see *Gumb v. Twenty-third St. R. Co.*, 114 N. Y. 411. But compare, in this connection, *Colwell v. Manhattan R. Co.*, 57 Hun (N. Y.) 452; *Morseman v. Manhattan R. Co.*, 16 Daly (N. Y.) 249.

And in the absence of evidence of the incurrence of such expenses, and their amount, no allowance therefor can be made. *Joliet v. Henry*, 11 Ill. App. 154; *Culberson v. Chicago, etc., R. Co.*, 50 Mo. App. 556; *Duke v. Missouri Pac. R. Co.*, 99 Mo. 347; *Norton v. St. Louis, etc., R. Co.*, 40 Mo. App. 642; *Rhodes v. Nevada City*, 47 Mo. App. 499; *Hunter v. Mexico City*, 49 Mo. App. 17; *Galveston, etc., R. Co. v. Thornsberry*, (Tex. 1891) 17 S. W. Rep. 521; *Fry v. Hillan*, (Tex. Civ. App. 1896) 37 S. W. Rep. 359. And see *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236, 20 Am. St. Rep. 601; *Gumb v. Twenty-third St. R. Co.*, 114 N. Y. 411.

Such is the case although it appears that the plaintiff required medical attention and actually had physicians in attendance for a considerable period, as a result of the injuries complained of. *Fry v. Hillan*, (Tex. Civ. App. 1896) 37 S. W. Rep. 359; *Galveston, etc., R. Co. v. Thornsberry*, (Tex. 1891) 17 S. W. Rep. 521.

CAMDEN & A. R. Co.

v.

WILLIAMS.

(Court of Errors and Appeals of New Jersey, June 23, 1898.)

Wrongful Death—Damages—Mortuary Tables.*—Standard mortuary tables may be used, in a judicial proceeding, to aid in deter-

*As to Mortality Tables as Evidence, see *Harrison v. Sutter St. Ry. Co.*, 8 Am. & Eng. R. Cas., N. S., 200; *Macon, etc., R. Co. v. Moore*, 5 Am. & Eng. R. Cas., N. S. 355, and extensive note, p. 364.

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mining the probable duration of human life. They do not furnish an absolute rule of computation. Each case must stand by itself, on its own conditions.

Same.—In a jury trial, where probable duration of human life is a subject of inquiry, a standard mortuary table may be received in evidence. It must be proved to be authentic, and its character and office should be explained.

Same.—The Carlisle table of mortality may be assumed to be a standard table, and is evidential, irrespective of the condition of health of the person whose expectancy of life is the subject of inquiry; but that condition must be taken into account in determining the probable duration of such person's life.

Evidence.—Failure to properly supplement legal evidence does not render it illegal. It will stand unless motion be made to suppress it.

Same—Declarations of Decedent.—A self-disserving declaration of a decedent, if admissible in evidence in an action to recover damages for injury alleged to have caused his death, it is not conclusive against the plaintiff.

Failure to Instruct.—Omission of a trial judge to instruct a jury on a particular point is not assignable as error unless such instruction be specially requested.

Comments by Court.—Comments on evidence in a charge to a jury are not assignable as error if the facts are left to the jury. It is only where a material fact is stated as in proof, where there is no evidence at all to support the statement, that there is legal ground of complaint in this regard.

(Syllabus by the Court.)

ERROR by defendant to supreme court. *Affirmed.*

Margaret Williams, administratrix of John Williams, deceased, recovered judgment, on verdict, against the Camden & Atlantic Railroad Company, for damages sustained by the widow and next of kin of the decedent by reason of his death, alleged to have been caused by negligence in the operation of the defendant's street railway in Atlantic city. The deceased and his young son were passengers upon an open car drawn by a trolley car that was propelled by electricity. The negligence charged was the sudden starting of the cars while the deceased was alighting at a crossing where a stop had been made at his signal. The defense was that the cars had not stopped when the deceased started to alight, and that in any case there was negligence in the manner of his alighting that contributed to the injury. A rule to show cause why a new trial should not be granted was discharged after argument (37 Atl. 1107), but the exceptions sealed

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at the trial were reserved, and are now before this court on writ of error. Judgment affirmed.

J. H. Gaskill, for plaintiff in error.

C. L. Cole, for defendant in error.

COLLINS, J. (after stating the facts). The second, sixth, and tenth assignments of error were waived. I will discuss the others in their order. The first is that the Carlisle table of mortality was admitted in evidence. It is common knowledge that approved mortuary tables are in constant use to aid in determining the probable expectancy of human life. They are derived from statistics preserved through a course of years, and have become standard by the test of subsequent experience. The

Wrongful Death—
Damages—Mortu-
ary Tables.

courts have almost universally availed themselves of help from these sources when expectancy of life became involved in a judicial proceeding. 15 Am. & Eng. Enc. Law, p. 881, and *notes*; Abb. Tr. Ev. p. 724; Gillett, Ind. & Col. Ev. § 85. An exhaustive history of the subject is embodied in Williams' Case, 3 Bland, 186, where CHANCELLOR BLAND seems to take judicial notice of the various tables, and makes use of them as aids in fixing the value of a life estate in lands. The right to use such standard tables in evidence has never been expressly declared in this court, but the common practice to so use them is recognized in the case of New Jersey Zinc & Iron Co. v. Lehigh Zinc & Iron Co., 50 N. J. Law, 189, 35 Atl. 915, where such use is stated as a proper exception to the general rule excluding books of inductive science as evidence. It is an exception resting really in necessity. A very satisfactory exposition of the legitimate use of such tables as applied to actions for damages for injury resulting in death will be found in the case of Steinbrunner v. Railway Co., 146 Pa. St. 504, 23 Atl. 239. They do not afford absolute rules for computation, but they may help to form the judgment. Each case stands by itself, and has its own conditions, and the tables must be intelligently applied to that case. Among mortuary

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tables, that known as the "Carlisle Table of Mortality" stands pre-eminent. It was elaborately compiled in the latter part of the last century from the statistics of certain parishes in the city of Carlisle, in England, extending over a series of years. It was received with a high degree of favor among insurers, and others concerned with forecasting the probable duration of life. It almost entirely superseded the Northampton table, and others still earlier, now altogether obsolete. It is said of this Carlisle table in the *Encyclopedia Britannica* (vol. 13 [9th Ed.] p. 169) that "no other mortality table has been so extensively employed in the construction of auxiliary tables of all kinds for computing the values of benefits depending upon human lives." Insurers now resort to their own experience tables, compiled from their statistics of selected lives, but there seems to be no successor to this general table of mortality. Every lawyer knows that it forms the basis of the table adopted by our own court of chancery as a guide for calculating the value of a life estate (*Chancery Rule 184*); and it everywhere has gained judicial recognition, as will appear upon consulting the decisions noted in the works above cited on the general subject. It is proper, therefore, to admit this standard table in evidence without proof of its repute. That may be assumed. Of course, the authenticity of the paper produced as the table should be established by proof satisfactory to the court, as by the testimony of a witness familiar with it and with its use. There was no such proof in the case in hand, but both the exception and the assignment of error admit authenticity, and there is no complaint now on that score. The complaint is that the judge did not explain and limit the evidential force of the table, and particularly caution the jury that it could not be considered at all unless the deceased was proved to have been in good health at the time of the injury. This complaint does not support the exception. That was directed against the mere admission of the table in evidence. It was

Same.

Same.

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legal evidence, irrespective of the condition of health of the deceased, for it is not a table compiled from statistics of selected lives only ; but, of course, such condition had to be taken into account, and testimony on that subject was in fact taken by both parties. The table was not admitted as controlling. The judge said, "We are not bound by it;" and in his charge to the jury he very clearly and correctly stated the rules governing the estimate of probable duration of life to be made by a jury in awarding damages in case of injury resulting in death. We think that when, in a jury trial, resort is had to a mortuary table, its

Evidence. offices and use should be explained by a competent witness, but omission to call such a witness does not make the previous admission of the table legal error. Like any other evidence available only when supplemented, it stands unless motion be made to suppress it. Its effect is another matter. That the judge, in his charge, failed to refer to and explain the legitimate use of the table, affords no ground of complaint, in the absence of any request for cautionary instruction, and of any exception in that regard. *Mead v. State*, 53 N. J. Law, 601, 23 Atl. 264.

The third assignment complains that the judge struck out legal testimony. He did strike out two questions and answers, because, as he justly said, they were "exceedingly confused." This was not reversible error. The judge did not intend to exclude the testimony, and should and could not have been understood as so intending. Counsel was given full liberty to elicit such testimony in a more intelligible form, but evidently thought it not worth while to do so.

The fourth assignment complains that the judge, in his charge, asserted as a fact, instead of as the plaintiff's claim, that young Williams was carrying an umbrella and a satchel, with which the defendant claimed the deceased was incumbered when he attempted to alight from the car. This is hypercritical. Later in his charge the judge said that this was a disputed question, and, in response to a request of the defend-

ant's counsel, expressly instructed the jury that if the deceased had the umbrella and satchel in his hand, and there existed other conditions stated in the request, he was guilty of contributory negligence, and his administratrix could not recover.

The fifth assignment is based on an exception to the judge's remark to the jury that Mr Williams' fall was a hard one. We do not feel required, on a writ of error, to read and weigh all the testimony, in order to determine whether or not this remark was justifiable. The law of gravitation would seem to warrant the adjective, when applied to any fall from the runboard of a car suddenly started, where the subject of the fall strikes the ground upon his back.

The sixth assignment assumes that a remark of the judge, that "people are apt to be free and easy about getting on and off a trolley car without stopping," may have injured the defendant. The context shows that the judge meant to disapprove the practice he mentioned, for he adds that "they take the risk." The remark could not have affected the plaintiff's right of recovery, for that was made to depend upon the car having stopped before the deceased stepped from it.

The remaining assignments deal with the effect of the treatment in the charge of an alleged self-disserving declaration of the decedent. It appeared in the case that, directly after the fall, Mr. Williams was carried by the bystanders to a Room—Declarations of Decedent. neighboring saloon, where whiskey was given him as a stimulant. A physician was summoned. Young Williams testified that his father was in a dazed condition, but in about 15 minutes seemed all right, and the witness went to notify his mother. In the meantime Dr. Ullmer (the physician sent for) had arrived. He was called as a witness for the defense. He testified, among other things, to a conversation with Mr. Williams while sitting in the saloon. His testimony on that subject was as follows: "Naturally, I asked him how it happened; and he told me he was coming up the avenue with his little boy, and he said he wanted

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to stop at South Carolina avenue for the train, and the car either didn't stop, or he didn't get off, and signaled again at North Carolina, and he was afraid they were not going to stop, and he jumped off." The judge was asked to charge the jury that, if they believed the doctor's statement of what the deceased said, there was negligence *per se*, and the plaintiff could not recover. He properly declined so to charge. The question could not be wholly decided upon that statement. The plaintiff was entitled to a verdict in accordance with the facts, and was not estopped by the decedent's declaration. It has been held in some jurisdictions that such a declaration is not even admissible in evidence in an action to recover damages for injury resulting in the death of the declarant, except when a part of the *res gestæ*. Tiff. Death Wrong. Act, § 194. We need not pass upon this question. Certainly the declaration is not conclusive as evidence. A further complaint is that, in discussing this subject the judge called attention to the fact that Mr. Williams' account of the affair was given "after the man had been hurled to the ground, picked up, and stimulated with whiskey," and told the jury to consider "whether or not, in his condition,—coming from an occurrence which was of so serious and sudden a character, under the influence of stimulants, and at the same time under the influence of the natural confusion of mind,—he could give a perfect and accurate statement of just how the thing happened." Exception was taken to the language quoted on the ground that "there was no contradiction of the doctor's testimony that at the time the deceased was perfectly conscious, coherent, and unconfused." The doctor gave no such testimony. He merely said that he didn't notice that the stimulant had had any effect upon the deceased. I see nothing objectionable in the judge's remark; certainly, no reversible error. His use of the word "hurled" was criticised in the argument in this court, but not in the exception presented to the judge. It was a strong word, but, in the connection in which it was used, could have

Comments by Court.

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done no harm. It related to the character of the fall, not to its cause. Exception was also taken to a suggestion of the judge that Mr. Williams may have been mistaken in saying that he jumped from the car because he thought it was not going to stop at his signal, as "all the rest of the evidence in the case points to a different condition of things." It is claimed that this was a misrecital of the evidence. The judge was right. No witness said that Mr. Williams jumped from the car. All agreed that the car was moving very slowly between the crossings, and stopped within a few feet of the place where Mr. Williams stepped down, and within a second or two of his fall. The only dispute was as to whether it had stopped when he stepped down, and was started again, suddenly, before he could find footing, or whether he stepped down while it was yet in motion. The supposed statement of the decedent was in conflict with all the testimony, and the judge's comment was warranted.

I have discussed all the objections of counsel, in order to demonstrate that the plaintiff in error has no real grievance, but it should be understood that comments on evidence are not assignable as error. *Donnelly v. State*, 26 N. J. Law, 463; *Bruch v. Carter*, 32 N. J. Law, 554; *Castner v. Sliker*, 33 N. J. Law, 95, 507; *Engle v. State*, 50 N. J. Law, 272, 13 Atl. 604. Much latitude is necessary in presenting facts and inferences to a jury, and unless a fact of moment, clearly connected with the merits, is stated to be in proof, when such fact has no testimony whatever to support it, error cannot be assigned. Alleged misconceptions of the judge, as to matters of fact, and instructions founded upon such misconceptions will not suffice. See *Smith v. State*, 41 N. J. Law, 370; *State v. Raymond*, 53 N. J. Law, 260, 21 Atl. 328. The judgment will be affirmed.

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WESTERN & A. R. CO.

v.

BASS.

(Supreme Court of Georgia, May 27, 1898.)

Death by Wrongful Act—Limitations of Action.*—The right which the statute (Civ. Code, §§ 3828, 3829) gives to the widow to recover for the homicide of her husband when his death results from a crime or from criminal or other negligence, cannot exist until he is actually dead, and the statute of limitations begins to run from the date of his death, and not from the time at which the injury was inflicted which caused the death.

Same—Common Law Limitation.*—The common-law presumption in prosecutions for murder, appeals of death, and inquisitions against *deodands*, that an injury was not the proximate cause of the death when the death did not occur within a year and a day after the injury was inflicted does not apply to the right of action given by this statute.

*(Syllabus by the Court.)***ERROR** from Atlanta city court. *Affirmed.**Payne & Tye*, for plaintiff in error.*Maddox & Terrell*, for defendant in error.

FISH, J. On December 12, 1896, Mrs. Bass brought suit against the Western & Atlantic Railroad Company for the homicide of her husband. She alleged in her petition that while her husband was in the employ of the railroad company as engineer he was injured on February 21, 1891, without fault on his part, and that as a result of such injury, which was wholly caused by the fault and negligence of the company, he died on September 30, 1896. The petition fully set forth the circumstances under which plaintiff's husband was injured, the nature of the injuries, his age, amount he was earning, the amount of plaintiff's damages, etc. A demurrer was filed to the petition, upon the grounds (1) that it "shows on its

Case Stated.

*See notes at end of case.

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face that the cause of action sued for is barred by the statute of limitations, more than two years having expired before suit was instituted"; and (2) "there is no cause of action set forth in said petition." The demurrer was overruled, and the defendant excepted.

1. Was the plaintiff's right of action barred by the statute of limitations, because her suit was not filed within two years from the date her husband was injured? "Actions for injuries done to the

person shall be brought within two years after the right of action accrues." Civ. Code, § 3900. Death by Wrongful Act—Limitations of Action.

If the plaintiff's husband had sued for the injuries to his person, he must have brought his action within two years from the date such injuries were inflicted. The plaintiff's action, however, was not for injuries done to the person of her husband. She had no right, under the law, to sue for such injuries. No one except the husband himself could maintain an action for them. If, however, such injuries resulted in his death, then, under section 3828 of the Civil Code, a right of action accrued to her. That section provides that a widow may recover for the homicide of her husband, and plaintiff's suit is based upon the cause of action therein given her. This statute does not profess to revive the cause of action or the injury to the deceased in favor of his widow, nor is such its legal effect, but it creates a new cause of action in favor of the widow, unknown to the common law. The right of action given by the statute is for the homicide of the husband in all cases where the death results from a crime, or from criminal or other negligence, and is founded on a new grievance, namely, his homicide, and is for the injury thereby sustained by the widow and children, to whose exclusive benefit the damages must inure, as, under section 3829 of the Civil Code, "in the event of a recovery by the widow, she shall hold the amount recovered, subject to the law of descents, as if it had been personal property descending to the widow and children from the deceased, and no recovery had * * * shall be subject to any debt or liability

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of any character of the deceased husband." The widow's right of action for the wrongful homicide of her husband cannot exist at all until he is actually dead, and she cannot, as a matter of course, bring suit before her cause of action comes into life. The statute of limitation begins to run from the time the right of action accrues; that is, as soon as the party is entitled to apply to the proper tribunal. Ang. Lim. (6th Ed.) § 42. It is clear, therefore, that the statute of limitations which began to run against the husband from the date his right of action accrued, namely, the time the injuries were inflicted, could not be pleaded against the plaintiff in a suit for his homicide, alleged to have been caused by the same injuries, because she had no right of action until her husband died, and the statute could not run against a right of action before it came into existence. What we now rule is evidently not in conflict with the rejudications of this court to the effect that, where the widow sues for the homicide of her husband, the defendant may set up any defense which might have been pleaded to the merits of the issue, if a suit had been brought by the husband for injuries to his person.

2. It is contended that no cause of action is set forth in the plaintiff's petition, because it appears therefrom that the death of plaintiff's husband did not occur within a year and a day from the date of the infliction of the injuries which it is alleged caused his death. As the widow could not sue until her cause of action accrued, and as the cause of action given her by the statute did not accrue until her husband's death, it would be unreasonable to hold that she had no cause of action where a year and a day had elapsed, after the injury, before death occurred. The statute provides that a widow may recover for the homicide of her husband, and that the word "homicide" shall be held to include all cases where the death of the husband results from a crime, or from criminal or other negligence. To hold that she cannot recover for the death of her husband unless it occurs within a year

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Law Limitation.

and a day from the time the injury is inflicted, would be to qualify an express and unconditional right which the law confers upon her. The case of *Railroad Co. v. Clarke*, 152 U. S. 230, 14 Sup. Ct. 579, was an action brought in the circuit court of the United States for the district of Indiana, by the executor of a deceased person, under a statute of Indiana, against the plaintiff in error (defendant below), to recover damages for the death of the plaintiff's testator, alleged to have been caused by the wrongful act of the defendant. The casualty by which the plaintiff's testator was injured was alleged to have taken place November 25, 1886, and the death to have happened by reason of his injuries, February 23, 1888. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, contending that, as the death did not occur until after the expiration of a year and a day from the infliction of the injury, it could not be held, in law, to have been caused by the act of the defendant. The demurrer was overruled, and the trial resulted in a verdict and judgment for the plaintiff, and the case was carried by writ of error to the supreme court of the United States. MR. JUSTICE HARLAN, in delivering the opinion of the court, after full reference to the common-law rule of a year and a day as applicable to prosecutions for murder, appeals of death, and inquisitions against *deodands*, said: "In our judgment, the rule of a year and a day is inapplicable to the case before us. In prosecutions for murder the rule was one simply of criminal evidence. Appeals of death and inquisitions against *deodands*, although having some of the features of civil proceedings, were, in material respects, criminal in their nature. Besides, as we have seen, the statute of 6 Edw. I. c. 9, was construed (see Bac. Abr. tit. "Appeal," D; 2 Inst. 320, tit. "Appeal," D) as giving a year and a day from the death of the party killed; not from the time the wound was inflicted. And we do not understand that any different construction was placed on the statute of 3 Hen. VIII. c. 1., to which counsel referred. But, be that as it

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may, in prosecutions for murder and appeals of death the principal object was the punishment of public offenses. In cases of murder and appeals of death, human life was involved, while in inquisitions against *deodands* it was sought to forfeit property that had caused the death of some one. In such cases the rule of a year and a day might well have applied. But actions under a statute like the one in Indiana are, in their nature and consequences, wholly of a civil character. What the legislature had in view was to make provision for the widow and children, or next of kin, of one whose death had been caused by the wrongful act or omission of another. The reasons upon which the rule of a year and a day were applied in the above mentioned cases at common law do not apply with the same force in purely civil proceedings that involve no elements of punishment, but only provide compensation to certain relations of the decedent who have been deprived of his assistance and aid. As the statute, according to the construction placed upon it by the highest court in Indiana, allows the personal representative to sue within two years after the death of the testator or intestate, where death was caused by the wrongful act or omission of the defendant, we cannot by mere construction restrict that right to cases in which the death occurred within a year and a day after such act or omission. We repeat that, where death was caused by the wrongful act or omission of another, the right of the personal representative, suing for the benefit of the widow and children, or next of kin, to recover damages on account of such death, is complete under the statute, and may be asserted by action brought at any time within two years from the death." See, also, *Purcell v. Laurer* (Sup.) 43 N. Y. Supp. 988, and *Schlichting v. Wintgen*, 25 Hun, 626. In cases of this kind the jury must determine whether in fact the death resulted from the injury, and in so doing the lapse of time between the injury and the death is a circumstance to be considered by them, in connection with the other evidence in the case; and where a considerable period

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has elapsed between the injury and the death, the proof should be clear and strong that the injury was the proximate cause of the death. There was no error in overruling the demurrer. Judgment affirmed. All the justices concurring.

NOTE.

Death by Wrongful Act—Limitation of Action.—See *Carden v. Louisville & N. R. Co.* (Ky.), 10 Am. & Eng. R. Cas., N. S., 872, and *note*.

Same—Common Law Limitation.—The ancient rule of the common law, applicable to cases of murder, appeal of death, etc., that there was no liability where the deceased did not die within a year and a day after the injury, cannot be applied by mere analogy, to actions under the statute for an injury causing death. Unless the statutory limitations commence expressly at the time of the injury, the action for the wrongful death may be brought without regard to the length of time between the injury and the death. See *Louisville, etc., R. Co. v. Clarke*, 152 U. S. 230, where the subject is discussed at length. *Schlichting v. Wintgen*, 25 Hun (N. Y.) 626.

SWEETLAND

v.

CHICAGO & G. T. R. Co.

(*Supreme Court of Michigan, June 28, 1898.*)

Wrongful Death—Conscious Suffering—Burden of Proof.—In an action by an administrator for the benefit of the estate of a person killed in a railroad collision, damages cannot be recovered for the pain and sufferings of deceased, when it appears from the evidence that whether she was conscious after the collision is purely conjectural, the burden being on plaintiff to show conscious suffering.

Same—Exclusive Cause of Action—Construction of Statutes.*—Under the provisions of 3 How. Ann. St. of Michigan, where death results from injuries, recovery cannot be had both for the benefit of decedent's estate on account of such injuries, and for the loss to decedent's heir resulting from her death, section 7397, which provides for the survival of common-law actions for negligent injuries to the person, applying only to cases where death results from other causes than the wrongful injury.

ERROR by defendant to Cass county, circuit court.
Reversed.

*See note at end of case.

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Geer & Williams (E. W. Meddaugh, of counsel),
for appellant.

Marshall L. Howell and Edward Bacon, for appellee.

GRANT, J. We do not think that there was any tangible evidence from which the jury had the right to infer that the deceased endured pain and suffering.

The two trains collided with terrific force, and many were instantly killed. The witness Allen testified that he reached the telescoped car within three or four minutes after the collision; that he heard wails and groans within; that the car took fire within a minute or two afterwards; that within ten or fifteen minutes they were driven away by the heat of the flames. Plaintiff was a physician, and brother of the deceased. He testified that both the upper and lower extremities of the body were burned completely off, that the upper part of the scalp was entirely denuded, and that her left thigh bone was either burned off diagonally or had been fractured. From his examination of the body, he gave his opinion that death was not instantaneous. It is mere conjecture how long she lived, and there is nothing to indicate that she was conscious at any time after the accident, and before death, if death was not instantaneous. If she was not conscious, how can it be said that she suffered pain? Whether death was instantaneous, or whether, if not instantaneous, she was conscious after the injury, is purely conjectural.

Where one was found, about 10 minutes after the accident with his body crushed, and his bowels disrupted, and he was still breathing, but unconscious, and died almost immediately, without recovering consciousness, *held* that no damages could be recovered for pain and suffering. *Mulchahey v. Wheel Co.*, 145 Mass. 281, 14 N. E. 106. The court said: "But, as the plaintiff can only recover such damages as she can show were sustained by her intestate, if he became instantly insensible, and so remained until his death, nothing can be recovered for any physical or mental suffering sustained by him." Where a boat struck in the bank

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of a river, and sank in about 10 minutes, and a passenger was drowned, held that there could be no recovery for mental and physical pains and shock before death; that they were substantially contemporaneous with her death, and inseparable, as a matter of law, from it. *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949. In *Cheatham v. Red River Line*, 56 Fed. 248, damages were claimed for suffering while the deceased was struggling in the water before drowning. Held, there could be no recovery. Where one was struggling in the water 10 minutes after being thrown in by the wrongful act of the defendant, held that death was instantaneous. *Sherman v. Stage Co.*, 24 Iowa, 515. See, also, *Kennedy v. Refinery Co.*, 125 Mass. 90; *Tulley v. Railroad Co.*, 134 Mass. 499. The rule deducible from the above authorities, and we think also from sound reason, is that plaintiff must show that there was conscious suffering in order to sustain his suit for damages. It is not sufficient to show that the deceased might have lived a few moments after the accident. We are therefore of the opinion that the verdict based upon this count in the declaration cannot be sustained, Judgment reversed as to this count, and no new trial ordered.

LONG, C. J., and MOORE, J., concurred with GRANT, J.

LONG, C. J. This suit is brought to recover damages for personal injuries caused to the plaintiff's intestate by the collision of defendant's trains through the negligence of defendant; also to recover damages for her death resulting from such collision, and also for loss of personal property. The first count of the declaration is upon the common-law liability for pain and suffering, etc., endured by the deceased prior to death, which, it is claimed, was not instantaneous, and the right of action for which, it is insisted, survives by section 7397, 3 How. Ann. St., and is for the benefit of her estate. Under this count plaintiff had verdict and judgment for \$1,000. The second count is

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for loss of personal property, and, for which plaintiff had verdict and judgment for \$110. The third count is for the benefit of William W. Sweetland, a brother of deceased, who, it is claimed, was dependent upon her for support, and in whose interest the administrator claims the right to recover under sections 8313, 8314, 2 How. Ann. St. Under this count the jury found in favor of defendant. Defendant brings error.

The provisions of section 7397, 3 How. Ann. St., have been in force since 1838. In 1846 it read: "In addition to the actions which survive by the common law, the following shall also survive; that is to say: Actions of replevin and trover, actions for assault and battery, or false imprisonment, or for goods taken and carried away, and actions for damages done to real or personal estate." This statute was amended by Act No. 113, Pub. Acts 1885, by inserting into the original act the clause, "for negligent injuries to the person." Sections 8313 and 8314 are substantially a re-enactment of Lord Campbell's act, omitting the preamble and third section, which was first incorporated into our statutes in 1848, and was amended in 1873. As amended, it reads as follows:

"Section 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be distributed to the persons and in the proportion provided by law in relation to the distribution of personal property left by persons dying intes-

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tate, and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered."

It will be noticed that until 1885 there was no statute in this state providing for the survival of actions for negligent injuries to the person, and no suit could be maintained for the injury after the death of the injured person for the pain and suffering arising from such injuries. Was it the intention of the legislature under section 7397 to give a right of action for the benefit of the estate in case of death from an injury, and also to allow the heirs to recover under sections 8313 and 8314 for their pecuniary loss? I think not. The fact that the common-law right of action which survives under section 7397 is for the benefit of the decedent's estate, and that the right of action under sections 8313 and 8314 is given for the benefit of the decedent's heirs, can make no difference in the construction which I think must be placed upon these statutes. It was not the intention of the legislature to give two rights of recovery for the same injury which results in death. The act giving a right of action for damages for wrongful death was passed by our legislature several years after the act providing for survival of actions, and was intended to provide the only remedy where death resulted from any wrongful act. If Mrs. Aldrich, the decedent, had lived long enough to bring suit against defendant for injuries, etc., and pain and suffering, both past and future, and the jury had awarded her damages, which had been paid, and then she had died from the same injuries so wrongfully inflicted, would it be held that the administrator might maintain another action under sections 8313 and 8314? Or, had she survived her injuries long enough to have settled with the defendant, and had so settled, would it be held that the administrator could maintain an action under these sections? It is generally held that if the deceased had

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settled for injuries received in his lifetime, or recovered damages in an action, an action cannot be maintained, under Lord Campbell's act, after his death. Cooley, Torts, 309. It must follow, therefore, that if such judgment obtained by her in her lifetime or settlement so made by her is a bar to a recovery by the heirs under sections 8313 and 8314, then a judgment obtained by the heirs for a cause of action accruing to them by survival under section 7397 would be a bar to the right to recover for her death under sections 8313 and 8314. In other words, it is apparent that it has not been the understanding of the courts and law writers that such statutes intended to create two rights of action for the same wrongful act. It is true that repeals by implication are not favored in the law. There is, however, no such repugnance in these statutes that both cannot stand. Section 7397, which provides for the survival of common-law actions for negligent injuries to the person, applies to cases where death results from other causes than the wrongful injury. It seems to me that this is made plain from the terms of the statutes. In *Rogers v. Windoes*, 48 Mich. 628, 12 N. W. 882, the action was brought for the wrongful conversion of testator's property during his life-time. The court below held that the action died with the person, and no action survived. It was held that the action did survive, and the judgment below was reversed. That case in no way conflicts with the interpretation which we give to these statutes. It is true that some language was used in *Hurst v. Railway Co.*, 84 Mich. 544, 48 N. W. 44, which might be taken as holding that satisfaction under one of these statutes would be no bar to a suit under the other; but that question was not involved in that case, and the language was but mere *dicta*.

The Illinois act passed in 1853 is almost identical with our sections 8313, 8314. The revival act of that state includes within the actions which survive, actions to recover damages for injury to the person. This last act was passed in 1874. In *Holton v. Daly*, 106 Ill. 131, one Michael Daly was injured, and brought suit, and

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recovered judgment, which was afterwards set aside. Subsequent to this he died intestate, and Mary Daly was appointed administratrix. She was substituted party plaintiff in the cause, which was again tried, and resulted in favor of plaintiff. The supreme court in construing the two acts, held that the death act applied, and that no recovery could be had under the survival act. The court said: "The act of February 12, 1853, applies, as we have seen by its own terms, to all cases where the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof. As was said in *City of Chicago v. Major*, 18 Ill. 356, 'This language is very broad and comprehensive, embracing in direct and positive terms all cases where, if death had not ensued, the injured party could have maintained an action for the injury,' and, as we have already observed, it is the wrongful act, neglect or default that constitutes the cause of action. A right of action which at common law would have terminated at the death is continued for the benefit of the wife, husband, etc., and its scope enlarged to embrace the injury resulting from the death. There were left, however, injuries to the person not resulting in death, for which, in the event of the death of the injured party before obtaining judgment, no remedy was provided affording a proper subject-matter for the act of 1872. If a party receiving injuries died from other causes, no action could be maintained under the act of February 12, 1853; but now, under the statute of 1872; the cause of action survives to his personal representatives. It is not to be presumed it was intended there should be two causes of action in distinct and different rights by the same party plaintiff for the same wrongful act, neglect, or default. * * * It is true, the measure of recovery in the different cases is not the same, but the cause of action is, *viz.* the wrongful act, neglect, or default. We feel, therefore, constrained to hold that the act of 1872

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was not intended to apply to cases embraced by the act of February 12, 1853." In *Railroad Co. v. O'Conner*, 119 Ill. 586, 9 N. E. 263, it appeared that Jeremiah O'Conner, in his lifetime brought suit against the railroad company for damages for personal injuries, and obtained judgment. An appeal was taken, and pending the appeal O'Conner died from causes other than the injuries complained of in the declaration. His son was substituted as plaintiff in the suit. It was said by the court: "The action being for personal injuries caused by the negligence of the defendant, it is within the statute, and survives. There is nothing in *Holton v. Daly*, 106 Ill. 131, which holds to the contrary. Indeed, it is expressly therein recognized that such actions do survive upon the death of the plaintiff; and it was held, when death is the result of the injuries for which the suit is brought, the action must be prosecuted for the benefit of the widow and the next of kin, and that in such case there can be no recovery for the bodily pain and suffering, but that, where the death results from other causes than the injuries for which the suit is brought, there may be a recovery, notwithstanding the death for precisely the same injuries that the party himself could have recovered for had he lived until after the final trial."

The statutes of Kansas are similar to our own. Section 420 of the compilation of 1879 is the revival act, and provides for the survival of actions to recover damages for an injury to the person. Section 422 of the same is the death act. In *McCarthy v. Railroad Co.*, 18 Kan. 46, these two sections were construed, and it was held that they must be construed *in pari materia*. The court said: "The purpose of section 422 is, evidently, not only to fix the amount of damages, and limit them to the use of the widow and children and next of kin, but to take away the right of the administrator to sue for the benefit of the estate generally, where death resulted from the injuries. Section 420, as construed with section 422, only causes the action to survive for injury to the person when the

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death does not result from such injury, but does occur from other circumstances. The right of action under section 422 is exclusive, and an administrator could not maintain an action under sections 420 and 422 for the same injury. When death results from wrongful acts, section 422 is intended solely to apply,"—citing *Read v. Railroad Co.*, L. R. 3 Q. B. 555; *Andrews v. Railroad Co.*, 34 Conn. 57. In *Hurlbert v. City of Topeka*, 34 Fed. 510, where the action was brought by the administrator for injuries to the decedent in her lifetime, and from which she died, Mr. JUSTICE BREWER, before whom the cause was tried, held that no recovery could be had under Comp. Laws, § 420, and that in cases of death from negligent injuries section 422 applied. JUSTICE BREWER was on the bench of the state court when the McCarthy Case was decided, and joined in that opinion; but in the case in the federal court he expressed some doubt about the correctness of the ruling in that case, though he followed it in the Hurlbert Case. This doubt seems to have been based upon the rule laid down in *Needham v. Railroad Co.*, 38 Vt. 294, where it was held that, where death occurs in consequence of a bodily injury, two causes of suit or action may arise,—one in favor of the decedent for his loss and suffering resulting from the injury in his lifetime, and revived by the act of 1847; the other founded on his death, or on the damages resulting from his death to his widow and next of kin, under the act of 1849. But, however much Mr. JUSTICE BREWER may have been shaken as to the correctness of his conclusions in the McCarthy Case by the Needham Case, it seems that the supreme court of Vermont in a later case (one decided in 1890) was not satisfied with the conclusions reached in the Needham Case in 1865. As early as 1881 JUDGE VEAZEY of the Vermont court wrote an opinion which met the approval of a majority of the court in effect overruling some of the conclusions reached in the Needham Case. This opinion was not filed, as the case went off on other questions. In *Legg v. Britton*, 64 Vt. 656, 24 Atl. 1016, it was held that

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the act providing for the recovery of damages for the benefit of the widow and next of kin where death results from the neglect or default of another does not create a new and additional cause of action; thus fully overruling the Needham Case.

In *Railroad Co. v. McElwain* (Ky.) 34 S. W. 236, the court, speaking of the two statutes, says: "We cannot believe that the general assembly intended that the personal representatives should maintain an action for the death of the wife, practically for the husband's benefit, and allow at the same time the husband to maintain one on his own account for the same act or negligence."

In *Lubrano v. Atlantic Mills* (R. I.) 32 Atl. 205 (decided in 1895), the question was whether, under the statutes of that state, an administrator had the right to maintain two actions for negligence resulting in death,—one for the benefit of the widow and next of kin, according to Lord Campbell's act; and another for the damage to the person, under the statute for the survival of actions. The action was brought for the pain and expense arising from injuries to the plaintiff's intestate before his death, which resulted therefrom. The defendant pleaded a judgment in its favor in a suit by the plaintiff in the same cause of action. The plaintiff replied that the former action was brought by him as trustee for the next of kin of the deceased, and in a different right from that involved in the present action, which was for the benefit of the estate. To this replication defendant demurred, and the demurrer was sustained. In substance, these statutes are like our own. The opinion of the court in that case is so well reasoned, and the cases which seem to differ from the correct principle so well explained, that I quote from it at some length. In speaking of the survival statute, the court said: "It is under this section that the plaintiff claims. In support of his claim he relies on *Bradshaw v. Railway Co.*, L. R. 10 C. P. 189; *Leggott v. Railroad Co.*, 1 Q. B. Div. 599; *Barnett v. Lucas*, 6 Ir. C. L. 247; *Bowes v. City of Boston*, 155 Mass.

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344, 29 N. E. 633; and *Needham v. Railroad Co.*, 38 Vt. 300. The opinion in *Bowes v. City of Boston* is based upon the statutes of Massachusetts, and holds that two actions, one for the benefit of the family and one for the benefit of the estate, may proceed at the same time, on independent grounds, and for different purposes. It cites no authority. In *Needham v. Railroad Co.* the point decided was that, the injury to the deceased having occurred in New Hampshire, where no right of action in either form survived, the plaintiff could not maintain action therefor in Vermont. The dictum relating to two causes of action has been recently overruled in *Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016. *Barnett v. Lucas* was an action for injury to personal estate, and is, therefore, not in point. *Bradshaw v. Railroad Co.* was on demurrer to the declaration, which alleged a breach of contract to carry a passenger safely, and it was held that the action could be maintained, notwithstanding the fact that provision for compensation for the death was made by Lord Campbell's act. The case was decided in 1875; and *Leggott v. Railroad Co.*, decided in 1876, was a case upon a similar contract, to which the defendant pleaded a denial of the averments of fact, and a recovery by the plaintiff under Lord Campbell's act. The plaintiff replied that the defendant was estopped by the judgment in the former case to deny the facts, and to this replication the defendant demurred. The court held that there was no estoppel, because the plaintiff sued in a different right; and, in deciding, followed *Bradshaw v. Railroad Co.*, but not without protestation. MILLER, J., said: 'With the single exception, so far as I am aware, of the case in the common pleas (*Bradshaw v. Railroad Co.*), there appears to be no authority that an action will lie by the executor in respect of what is claimed in this action; but, as that case has been decided on the very point, I entirely yield to the authority of the decision so far as to say that in this court it cannot be questioned, and we must, therefore, abide by it.' In *Pulling v. Railroad Co.*, 9 Q. B. Div.

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110, the Bradshaw Case was further commented upon. DENMAN, J., said: 'none of the authorities go so far as to say that where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. The case of *Bradshaw v. Railroad Co.* certainly does not go to that length, because the judgments in that case are expressly based upon the distinction, in this respect, between actions of contract and actions of tort, and upon the fact that in that case the action was an action of contract.' The opinion (POLLOCK, B. concurring) decided that the plaintiff could not sue for damages to the intestate's person. In view of these comments, the support which the Bradshaw Case gives the plaintiff turns out to be more apparent than real. Prior to these cases, that of *Read v. Railroad Co.*, L. R., 3 Q. B. 555, had been decided in 1868, holding that satisfaction received by the deceased in his lifetime for the injury was a bar to the suit for the death. That case states the principal upon which the compensatory act is founded. It creates no new cause of action by reason of the death, but gives a new right of recovery in substitution for the right of action which the deceased would have had if he had survived. Upon this principle the new remedy must be exclusive, since otherwise there would be two recoveries for the same cause of action, namely, the negligence of the defendant, which is the cause of action on which the deceased would have sued at common law if he had survived. Moreover, the recognized rules of construction lead to the conclusion that the remedy for the death is exclusive. While the act relates to a remedy, it is, nevertheless, in derogation of the common law, because it gives a right of action where none existed at common law; and so it should be strictly construed. The provisions for survival of actions for damages to the persons and for the remedy for the death have been embodied in the same statute in this state since 1857,

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although the latter was first adopted. The general provision should not be construed to modify the special, since the intention to modify the former statute by giving additional remedy is not plain, and both can stand together; the act of survival embracing damages to the person other than those which result in death. This is the construction which was given to precisely similar provisions in *Holton v. Daly*, 106 Ill. 131, where it was held that the only cause of action was the wrong done, irrespective of consequences, and that a statute of survival subsequently passed did not give a remedy additional to that of the prior act relating to the death. * * * So in *Railroad Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263, it was held that where the plaintiff, pending an action for injuries, dies from some other cause than the injury, the action survives, and may be prosecuted by his administrator. In *McCarthy v. Railroad Co.*, 18 Kan. 46, where both provisions for an action for injury to the person had been embodied in a revision, as in our own statutes, it was held that they must be construed in *pari materia*, and that the latter provision applied only to cases where death did not result from the injury. This decision was followed in *Hurlbert v. City of Topeka*, 34 Fed. 510."

In *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357, FIELD, J., said: "Read v. Railway Co., L. R. 3 Q. B. 555, is a clear decision that Lord Campbell's act did not give a new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived." In *Railway Co. v. Robinson*, 19 Can. Sup. Ct. 292, TASCHEREAU, J., quotes with approval the language of FIELD, J., in *Griffiths v. Dudley*, *supra*. In *Wood v. Gray* [1892] App. Cas. 576, it appears that a workman, having been injured through the fault, as he alleged, of his employers, brought an action against them for damages. While the action was pending, he died intestate and unmarried. His mother was appointed his executrix, and she raised a second and concurrent action for *solatium* for her son's death, and

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asked that the second action should be remitted to the same jury who were to try the first. It was held, affirming the court of sessions, that the second action was incompetent. LORD WATSON, who delivered the opinion of the house of lords, among other things said: "There is not a single instance in which the court has allowed two actions to be brought in respect of the same negligent act leading to the injury and death of one person. Even in cases where the right of relatives to sue has been recognized, they must bring one suit, and only one, in which the damages due to them respectively may be assessed. In that state of the law, I do not think this house ought to encourage the creation of a new right and corresponding liability which are at present unknown in Scotland." LORD FIELD, concurring in that opinion, said: "The appellant did cite to your lordships a great many cases. I have been carefully through them, and have considered them, and it seems to me, so far as I can follow the question, that there is no foundation whatever for the appellant's contention." That two actions cannot be maintained for the same wrongful act, see *Bigelow v. Nickerson*, 17 C. C. A. 1, 70 Fed. 113; *In re City of Norwalk*, 55 Fed. 98; *Steamboat Co. v. Chase*, 16 Wall 532; *Dibble v. Railroad Co.*, 25 Barb. 188; *Proctor v. Railroad Co.*, 64 Mo. 119; *Fowlkes v. Railroad Co.*, 5 Baxt. 663.

In a late case in Kansas, decided July 10, 1897—*Martin v. Railway Co.* (Kan. Sup.) 49 Pac. 605,—It was held that section 420 of the survival statute only permits actions to survive for injury to the person when death does not result from the injury, but occurs from other causes; but, however, where death results from the wrongful act or omission of another, section 422—the death act—is exclusive. That court cites in support of that rule of construction: *Andrews v. Railroad Co.* 34 Conn. 57; *Read v. Railway Co.*, L. R. 3 Q. B. 555; *Railroad Co. v. O'Connor*, 19 Ill. App. 591; *Holton v. Daly*, 106 Ill. 131; *Railroad Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263; *Tiff. Death Wrongful Act*, § 119.

In *Hill v. Railroad Co.*, 35 Atl. 997, decided by the

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supreme court of Pennsylvania November 9, 1896, it appeared that the act of 1851 of that state provides that no action for personal injuries by negligence or default shall abate by reason of plaintiff's death, but shall survive to his personal representatives; that where the injured person did not sue during his life, his widow or personal representative may sue; that the right of action to children and parents of a decedent be extended, and also provides for the distribution of damages recovered. It was held that a widow was not given an independent cause of action for an injury causing her husband's death which he could not in his lifetime release or compound. In that case the court cites *Read v. Railroad Co.*, L. R. 3 Q. B. 555, and the opinion of LUSH, J., with approval, in which he said: "The intention of the statute is not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the persons injured to recover in a case where the maxim, '*Actio personalis moritur cum persona*,' would have applied. It only points to a case where the party injured has not recovered compensation against the wrongdoer."

I am aware that in some of the states it is held by the courts that two actions may be maintained under statutes somewhat similar to our own; but the case of *Needham v. Railway Co.*, 38 Vt. 294, we have seen, has been effectually overruled by the later case of *Legg v. Britton*, *supra*, and the case of *Bowes v. City of Boston*, 155 Mass. 344, 29 N. E. 633, shown not to be well reasoned, by the Rhode Island court in *Lubrano v. Atlantic Mills*, *supra*. In *Railroad Co. v. Phillips*, 64 Miss. 693, 2 South. 537, it is held that two actions may be maintained under somewhat similar statutes to our own; but the court cites no cases sustaining such a rule, though counsel for plaintiff in that case in his brief seems to rely upon *Needham v. Railroad Co.*, 38 Vt. 294. In *Davis v. Railway Co.*, 53 Ark. 117, 13 S. W. 801, the court seems also to have relied upon *Needham v. Railroad Co.*, 38 Vt. 294. In the case of *Hedrick v. Navigation Co.*, 30 Pac. 714, decided by the

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supreme court of Washington in 1892, the statutes treated of are very different from our own, and the case is not authority for the contention made for it.

It is claimed that in construing these acts, the amendment of 1885 of the survival act must speak from the date of the original act. This is undoubtedly true. But it has never been contended in this state, so far as I can ascertain, until the present action was brought, that a cause of action survives for a negligent injury, or for an assault and battery, where death results from the wrongful act, though these two statutes have been on the statute books for 50 years, and the amendment of 1885 as to negligent injuries over 12 years. Apparently it was thought by the profession that actions in such cases must be brought under the death act, as no one ever before claimed that two actions would lie for the same wrongful act. From the history of the cases in this state, it is at once apparent what the legislative intent was in passing the amendment of 1885. Prior to that time, if the party negligently injured brought suit for damages, and died during the pendency of the case from some other cause than the negligent injury, the suit immediately abated, and no right of action accrued to his personal representatives under sections 8313 and 8314, because his death was not the result of the wrongful act or omission. The profession was often confronted with this condition, as all such suits abated by the death of the party. But since 1848, when death resulted from the wrongful act, actions could be maintained under the death act. It was not necessary to amend either statute to give a right of action where death did result from the wrongful act. That right already existed. The purpose of the legislature, therefore, was to provide a remedy when one was lost by the death of the party, by the survival of the action which the party himself might have brought in his lifetime for wrongful injuries not resulting in death, and which cause of action did not survive under the former act. The only logical construction of these statutes, so as to give effect to both, is that the death act applies to

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cases of death caused by wrongful injuries, while the survival act applies to cases of personal injuries not causing death. If these two acts had been passed at the same time, each being embodied in different sections of the same act, what ground would this have afforded for the contention that the survival section applies to injuries resulting in death? We should then have to reconcile and render operative both sections, as now. The question of the legislative intent of the survival provision in reference to injuries causing death would still be open. The illogical result of holding that the survival provision was intended to cover cases of wrongful killing would still be presented, and would force the conclusion that the legislature intended the survival provision should apply only to personal injuries not causing death. If we start with the survival act as in existence at the date when the death act was passed, the result is not changed. We then have an act which provided for the survival of actions for personal injuries followed by another giving a right of action for personal injuries resulting in death. It cannot be contended that the survival act conferred a right of action for wrongful killing. More definite and specific language indicative of the legislative purpose to do this would be required. In Illinois the death act was passed first. In *Holton v. Daly*, *supra*, both these Illinois statutes were construed, and it was held that both should be given effect; that where death occurred from the injury the death act applied, and where the person died from some other cause than the injury the survival act applied. This decision was not based upon the fact that the death act was first passed. In Rhode Island the survival act was passed first; and the court, in the *Lubrano Case*, *supra*, construed these statutes with the same result as reached in *Holton v. Daly*, and by the same reasoning, that both acts must be construed together. In the *McCarthy Case*, *supra*, it appeared that both acts were passed and took effect upon the same day, and effect was given to both, and it was held that the survival act applied

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to cases only where the death resulted from some other cause than the wrongful act. In all the cases cited by counsel where a different result has been reached the decisions have been based upon the ground that Lord Campbell's act created a new cause of action. I think there is nothing, either upon principle or authority, in the fact that one act was passed before the other which affects the construction to be given these statutes. The real question is (both statutes being in force), how should they be construed so as to give effect to both? And I think the only logical construction is that given by most of the cases; that is, that the survival act applies to cases of negligent injuries to the person that are not fatal, and that Lord Campbell's act applies to fatal cases.

But it is suggested that another view might be taken of these statutes, and thus give a definite and certain rule; that is, that where the person is injured, and survives the injury for a time, a right of action accrues to him which survives in case of his death before judgment, and that in such case the death act has no application. But, if the person is killed outright, no right of action could accrue to him; therefore none could survive, and the death act would necessarily furnish the only relief. Let us see how this construction would leave the parties who were dependent upon the deceased. Under the survival act, the amount recovered goes into the estate for the benefit of creditors, and, if the estate be insolvent, the creditors might receive every dollar of the amount. Is it possible that the legislature was so solicitous for the creditors of the deceased that a limitation was put upon the death act, and a recovery under that act (the proceeds of which go to the dependent ones) made possible only when the death was instantaneous? To illustrate: Suppose A. is 30 years of age, has a wife and children, earns \$125 per month, and receives an injury which he survives one hour. During that hour a right of action has accrued to him. The death act, then, has no application to the case, and no recovery can be had under it.

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The administrator, under such a construction, could recover under the survival act for the pain and suffering caused by the injury, which might be merely nominal, and this would go to the creditors if the estate were insolvent. If the action could be brought under the death act, the widow and children would receive the whole of the fund recovered, and the damages would be founded upon the pecuniary loss of those dependent upon the deceased. It cannot be possible that the legislature ever intended such a limitation upon the death act. A recovery under the death act has always been permitted in this state when the death results from the wrongful act, and this without regard to whether the death was instantaneous or not. In *Van Brunt v. Railway Co.*, 78 Mich. 530, 44 N. W. 321, it appeared that the plaintiff's intestate was injured January 1, 1888, and died from the injuries on the next day. On the trial it was shown that the deceased was an unmarried man, and had no one dependent upon him for support. The court below directed the verdict in favor of defendant. In this court the case was fully considered, and it was assumed that, if the plaintiff had been able to show pecuniary loss by next of kin, a recovery might be had. A point was made that a recovery might be had under the survival act and that point overruled. In *Hunn v. Railroad Co.*, 78 Mich. 513, 44 N. W. 502, plaintiff's intestate, a fireman, was killed in a collision of defendant's trains. The action was brought under the death act. Just how long he survived the injury does not appear, but that fact was ignored. The case was reversed upon the ground that the court improperly admitted certain testimony, and a new trial was granted. In *Sweet v. Railway Co.*, 87 Mich. 559, 49 N. W. 882, plaintiff's intestate was injured by striking against a shed adjacent to the track. He lived 30 minutes after the accident. The action was brought under the death act, and judgment was rendered for \$5,000, and was affirmed in this court. MR. JUSTICE GRANT dissented, but not on the ground that the action could

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not be sustained under the death act. In *Richmond v. Railway Co.*, 87 Mich. 374, 49 N. W. 621, plaintiff's intestate, a street-car driver, was killed in a collision of the defendant's cars with the street car he was driving. The injury occurred about 4 or 5 o'clock in the afternoon, and he survived until the evening of the same day. The action was brought for the benefit of the mother and an invalid sister, and a recovery had under the death act. The judgment was for \$5,313, and was affirmed in this court. JUSTICES GRANT and CHAMPLIN dissented, but not upon the ground that the action could not be maintained under the death act. In *Schlacker v. Mining Co.*, 89 Mich. 253, 50 N. W. 839, the action was under the death act. The plaintiff's intestate was injured and survived several days. The fact that the death was not instantaneous was ignored. The judgment was reversed and a new trial ordered. In *O'Donnell v. Railway Co.*, 89 Mich. 174, 50 N. W. 801, though the deceased lived about an hour after the injury, the action was brought under the death act, and no one questioned that the act was applicable if the circumstances had been such that a recovery might have been had. In *Pennington v. Railroad Co.*, 90 Mich. 505, 51 N. W. 634, plaintiff's intestate was injured while switching cars. He survived six hours. The action was brought under the death act. Plaintiff recovered in the court below for the pecuniary loss sustained by the widow and children, and for the expense of his care, nursing, and funeral expenses. While the case was reversed, no one questioned the right of recovery upon the ground that the action could not be maintained under this act, or questioned that the damages claimed could not be recovered as claimed if the defendant had been guilty of the several acts of negligence averred in the declaration. In *Racho v. City of Detroit*, 90 Mich. 92, 51 N. W. 360, it appeared that the plaintiff's intestate was injured June 25, 1889, and died June 10, 1890. No action was instituted in the lifetime of the intestate. After his death the widow, as administratrix, brought suit under sections 8313,

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8314, 2 How. Ann. St. The lower court directed verdict and judgment in favor of defendant. That judgment was reversed, and a new trial ordered; it being held that the widow, as administratrix, could recover under the above sections of the statute. Not one of these cases could have been maintained if these statutes had been construed as now contended for, for in no case was the death instantaneous. Other cases of like character might be cited. I have examined the cases with some care, for the purpose of ascertaining in what proportion of them the death was shown to have been instantaneous, and find but very few. If, therefore, the death act can be applied only to cases where the death is instantaneous, it should be amended in order that the widow and children of the deceased may have some benefit under it. From the cases it appears that few persons were killed who did not have some one dependent upon them, and that few were killed outright. Are we, by construction of the statute, to cut off all the rights which such dependents may have? No case can be found in this state giving such construction, though this statute (the death act) has been upon the statute books for upwards of 50 years. I am aware that in Maine this construction is given to a similar statute. *State v. Maine Cent. R. Co.*, 60 Me. 490. But in no other jurisdiction is such a limitation put upon the death act, that I am aware of. In Massachusetts a contrary view is expressly held under a statute similar to the Maine statute. *Com. v. Metropolitan R. Co.*, 107 Mass. 236.

It must be held that the plaintiff could not maintain this action under the first count of the declaration. The only remedy was under sections 8313 and 8314. The court below was in error in permitting a recovery on the first count of the declaration. That part of the verdict and judgment must be reversed and held for naught. The verdict and judgment for the value of the personal property destroyed will stand. No new trial will be permitted. Defendant should recover the costs of this court.

GRANT, J., concurred with LONG, C. J.

NOTE

Whether Recovery in an Action for Injuries Causing Death is a Bar to an Action for the Death.—*Arkansas*.—The act of 1838 (Mansf. Dig. § 5332) which provides that an action for wrongs done to the person of another may, after his death, be brought by his personal representative for the benefit of his estate, is not repealed by the act of 1883 (Mansf. Dig. §§ 5225, 5226), which provides for an action by the personal representative for the benefit of the widow and next of kin for pecuniary loss sustained by the death of a person caused by the wrongful act, neglect, or default of another. Both actions may proceed *pari passu*, and a recovery in one action will not bar a recovery in the other. *Davis v. St. Louis, I. M. & S. R. Co.*, 44 Am. & Eng. R. Cas. 690, 53 Ark. 117, 13 S. W. Rep. 801.

California.—Under § 387 of the California Code of Civ. Proc., an action may be brought for a wrongful death by either the heirs or the personal representative of the deceased. But this statute does not permit separate actions to be brought or maintained by both. But one action is permitted, and when this action is brought and the court has obtained jurisdiction, the pendency of the prior action may be pleaded in abatement, or if judgment has been rendered, such judgment may be pleaded in bar. *Hartigan v. Southern Pac. R. Co.*, California Sup. Ct., Oct. 3, 1890.

Georgia.—The father's right of action is one existing independently of the statute, and his recovery is confined to the value of his son's services between the time of injury and the death. The mother's right of action is for the loss of her son's life and the consequent loss of an expected pecuniary benefit. *Augusta R. Co. v. Glover*, 92 Ga. 132, 58 Am. & Eng. R. Cas. 269.

Illinois.—In a suit under the *Illinois* statute by a father for the wrongful killing of his child, the fact that, before the child's death, there had been a recovery for medical attendance and similar expenses, and for loss of services before death, does not affect the damages recoverable in the second action. *Barley v. Chicago, etc., R. Co.*, 4 Biss. (U. S.) 430.

Massachusetts.—The right of action given to the personal representative by Pub. Stat., c. 52, § 17, to sue for damages for the loss of his intestate's life, such suit to be for the benefit of the widow and children of deceased, is separate and distinct from the right of action which the personal representative has to sue for the damages sustained by deceased in his lifetime and for the loss to his estate by his death, and the two actions may proceed at the same time. *Bowes v. Boston*, 155 Mass. 344.

The Employers' Liability Act (St. 1887, ch. 270, § 1, cl. 3, and § 3) does not give the administrator of an employee a right of action against an employer for causing the employee's death in addition to the right as legal representative to recover damages accruing to the intestate in his lifetime. *Ramsdell v. New York & N. E. R. Co.*, 151 Mass. 245, 23 N. E. Rep. 1103.

Michigan.—The right of action given by How. St. § 8314 to the personal representatives of a deceased person for the pecuniary injury resulting from his negligent killing, and that which survives under Act No. 113, Laws of 1835 (3 How. St. § 7397), for negligent injuries to the person, are separate and distinct causes of action, and the latter cannot be introduced into a cause based upon the right given under the statute first cited by way of amendment to the declaration. *Hurst v. Detroit City R. Co.*, 84 Mich. 539, 48 N. W. Rep. 44.

Note

Missouri.—A recovery under Rev. Stat. Mo., § 2123 by the parents of the deceased (a minor child), will bar a common-law action by them to recover for the loss of his services before death. *Graham v. Hannibal*, etc., R. Co., 28 Fed. Rep. 744. Compare *Davis v. St. Louis*, etc., R. Co., 53 Ark. 117, 44 Am. & Eng. R. Cas. 690.

New York.—In an action by a father, as administrator, brought under Laws of 1847, c. 450, Laws of 1849, c. 256, to recover for the death of his infant son, where the recovery is for his exclusive benefit, he may sue for and recover his entire damages, including the loss of his son's services during minority, in one action. But such a recovery will be a bar to another action brought by the father, as such, even assuming that he had such an action as the latter independently of the statute. *McGovern v. New York Cent.*, etc., R. Co., 67 N. Y. 417, 15 Am. Ry. Rep. 119.

Oregon.—Section 34 of Hill's Oregon Code gives the parent a right of action for "injury or death of a child." Section 371 gives the personal representative of one who has been killed by the wrongful act of another a right of action against the wrongdoers. It was held, by a divided court affirming the judgment of the trial court, that a recovery by the personal representative, deceased being an adult, was a bar to an action by the father, although the deceased had continued to render services to his father after his maturity just as he had done before. *Putman v. Southern Pac. Co.*, 21 Oregon 230.

South Carolina.—The statutory provision that the remedy given by Gen. Stat. S. Car., § 2183, "shall not apply to any case where the person injured has, for such injury, brought action which has proceeded to trial and final judgment before his or her death," is not an exception to the previous sections, nor does it imply that an action in behalf of the widow and children will be defeated only by judgment already had in an action brought by the deceased; but was intended only to prevent a double remedy for the same wrongful act in any possible case. *Price v. Richmond*, etc., R. Co., 33 S. Car. 556.

Tennessee.—Under the statutes of Tennessee, which confer a right of action upon the personal representative of a decedent whose death is caused by the wrongful act or omission of another for the wrong sustained by the deceased, and a right of action upon his next of kin for the injury resulting to them from his death, when the next of kin of such decedent is the sole distributee of his estate and the administrator thereof, he may recover damages on both of the grounds above mentioned in one suit. *Illinois C. R. Co. v. Crudup*, 63 Miss. 291.

Texas.—A posthumous child is not precluded from recovering damages for the death of his father by a suit brought by his mother and another beneficiary which resulted in a recovery in their favor. *Nelson v. Galveston*, etc., R. Co., 78 Tex. 621, 22 Am. St. Rep. 81, 48 Am. & Eng. R. Cas. 8.

Vermont.—One provision of the statute (Rev. Laws, § 2134) is that in case a party to an action for personal injuries dies pending the action, it may be prosecuted by or against his personal representative. Another provision (§§ 2138-39) is that where the death of any person is caused by the wrongful act of another, the wrongdoer shall be liable to an action to be brought by the personal representative and for the benefit of the widow and next of kin. The plaintiff in an action for personal injuries died while his action was

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pending, and the suit was revived in the name of his administrator. It was held that a judgment recovered in such action by the administrator was a bar to another action by him under sections 2138-39 for the benefit of the widow and next of kin of deceased. *Legg v. Britton*, 64 Vt. 652.

Two causes of action may arise where death is negligently caused: one in favor of the decedent under the act of 1847 for loss and suffering during his lifetime, and the other to his widow or next of kin under the act of 1849 for damages resulting to them from his death. *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

Washington.—Section 8 of the Code of 1881 provides for an action by the heirs or personal representatives. Section 9 provides for an action by the father for the death of his minor child. It is held that since a recovery under section 9 is limited to the loss of the services of the child during minority, a recovery by the personal representative under section 8 is no bar to an action by the father under section 9. *Hedrick v. Ilwaco R., etc., Co.*, 4 Wash, 400, 54 Am. & Eng. R. Cas. 45.

England.—The deceased was injured through the negligence of the defendant company to such an extent that he was never afterwards able to attend to business. His widow, as administratrix, brought suit to recover damages for his death, for the benefit of herself and children, and recovered a judgment, which was paid. Afterwards, she, as administratrix, brought a suit to recover for expenses incurred by deceased before his death and in consequence of the injuries. It was held under the *English* statute, that the recovery in the former action was no bar to the latter action. *Leggott v. Great Northern R. Co.*, 1 Q. B. Div. 599, 35 L. T. 334.

Ireland.—A recovery for wrongfully causing the death of a person is not a bar to a subsequent suit by the administrator to recover damages for the loss to the decedent's estate caused by his death. *Barnett v. Lucas*, 6 Ir. R. C. L. 247, affirming 5 Ir. R. C. L. 140.

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v.

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(Supreme Court of Minnesota, June 6, 1898.)

Evidence Justifies Verdict.—Evidence considered, and held that it supports the verdict, and that the damages awarded are not excessive as to justify the conclusion that they were given under the influence of passion or prejudice.

Medical Experts—Opinion Evidence—Admissibility.*—A medical expert gave an opinion in this case, and, on his cross-examination, testified that his opinion was based entirely upon his examination of the plaintiff, and what was elicited during the examination from her. Held, on the evidence, that the trial court did not err in refusing to strike out his opinion.

(Syllabus by the Court.)

*See note at end of case.

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APPEAL by defendant from Ramsey county district court. *Affirmed.*

Munn & Thygeson for appellant.

Samuel A. Anderson, for respondent.

START, C. J. The plaintiff was a passenger on one of the defendant's cars, which collided with a freight train of a steam railway, and this action was brought to recover for injuries which she claimed to have sustained in the collision by reason of the negligence of the defendant's motorman on the car. Verdict for the plaintiff for \$2,750, and the defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial.

Case Stated.

1. The negligence of the motorman is practically conceded, but the defendant claims that the evidence did not show that such negligence was the cause of plaintiff's injury. There is little or no direct evidence on the point, but the circumstantial evidence is not only sufficient to sustain the verdict on this point, but it is substantially conclusive. Many men have been rightfully convicted of felonies on less satisfactory evidence.

Evidence Justifies
Verdict.

2. A witness for the plaintiff, who was on the car at the time of the injury, testified that he noticed that the motorman, when he got a bell to stop, would turn on the electricity, instead of turning it off, and then turn it back again; that he noticed this several times. The defendant moved to strike out the evidence, as immaterial and not connected with the accident. The motion was denied, and exception taken. On his cross-examination the witness stated that it was a long way from the crossing at which the collision occurred; that he observed the motorman turn on the current when he got a bell to stop, but that it was on the same trip, and that he observed it at different times before the crossing was reached. The motion to strike out the evidence was renewed, and there was the same ruling and exception as before. This ruling is assigned as error. At

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the time this evidence was given, the negligence of the motorman in managing the car was at issue. The plaintiff had introduced evidence tending to prove such negligence, in that he failed to seasonably stop the car so as to avoid the collision with the freight train. The evidence objected to was not as to the general incompetency of the motorman, or that he had been negligent on a previous occasion, but it was as to his management of the car as he drove it on towards the crossing. In these respects it would seem that the case may be distinguished from *Fonda v. Railway Co.* (Minn.) 74 N. W. 166, and other cases relied on by the defendant. But, without so deciding, it is clear that, if the refusal to strike out the evidence was erroneous, it was not reversible error; for the negligence of the motorman was conclusively established, independent of this evidence, and the jury instructed that the case was not one for exemplary damages.

3. Upon the trial the plaintiff called a physician and surgeon, Dr. Lufkin, who had made a physical examination of her so as to qualify him to testify as an expert. In answer to a question calling for his opinion as to her injury, he answered, without objection, as follows: "My opinion is that there was possible injury to the structures underneath the ribs. Possibly the liver,—the covering of the liver." The defendant claims that it was made to appear by his cross-examination that this opinion was based on hearsay statements, and that the court erred in denying its motion to strike it out. The witness testified in chief that he knew nothing of his patient, save what was before him, and had no history of the case whatever, and that he made the examination before he asked about the cause of any injury for fear of being prejudiced. On the cross-examination he testified that he arrived at his conclusion upon his examination of the plaintiff, and the facts stated by her; and, further, "my opinion was arrived at entirely through my own examination, and what I elicited during that examination from the patient." The record fails

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to disclose that upon the examination the doctor elicited from the patient any fact or statement as to any past event, or as to her injury or past condition, or any fact not proper to be considered by him, in connection with the examination, in reaching a conclusion. The cross-examination did not go far enough to make this appear. It was not error for the court to refuse to strike out the evidence.

4. The last matter to be considered is the question of damages. The expert evidence is conflicting as to the extent of plaintiff's injury. Drs. Whitney and Dinwoodie, called by the plaintiff, testified, in substance, that her tenth rib was torn loose from the cartilage, and that there also seemed to be some injury to the rib above; that the injury to the rib has healed, but that neuralgia of the tenth intercostal nerve had resulted; and they give it as their opinion that she will never be as well as before the injury, and that she will always have a weak side. No definite opinion was expressed as to the probability of the neuralgia being permanent. The opinion of the third and last expert called by the plaintiff, Dr. Lufkin, we have already quoted. He also expressed the opinion that the injury had left trouble behind it of a severe character. The defendant called Drs. Wheaton and Ritchie, who had examined the plaintiff; and they severally testified to the effect that they were unable to find any evidence of abnormal conditions in the plaintiff's side or chest, or that there had been a separation of the rib from the cartilage. The testimony of the plaintiff and her family tended to show that she was strong and healthy before the injury, and never had had any trouble with her side; that, when she regained consciousness after the collision in which she was injured, her leg was bruised and lame, and her side felt as if it had been crushed; that she walked to the Fair grounds after the accident,—half a mile away,—but became sick and dizzy, and was taken home, and was under the care of her physician for two weeks; that it was five weeks before the separation healed; that she still suffers frequent and severe pains, and is

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unable to do washing, sweeping, sewing, or any other work which she was accustomed to do before the injury, except light household work. This was her physical condition as testified to by herself and others at the time of the trial of this action, some nine months after the injury. She was 35 years old at that time, and the mother of six children. The evidence on the part of the plaintiff as to her injuries was sufficient, if satisfactory to the jury, to sustain a finding that she will never wholly recover from the physical effects of the injury, and that as long as she lives she must endure more or less pain, and that she has been partially incapacitated thereby for life's work and duty. The fact that at the time of the trial, some months after her wound had healed, her physical condition was such as claimed, increases the probability that the effect of the injury will be, to some extent at least, permanent. While we are not wholly satisfied with the verdict, and believe that the ends of justice would have been better served if the damages had been assessed in an amount at least one-fourth less than they were, still the evidence does not justify the conclusion that the damages were given under the influence of passion or prejudice, and we have no right to substitute our judgment for that of the jury. Order affirmed.

NOTE.

Opinion Evidence—Medical Experts.—Medical experts may testify concerning the health of a certain person whom they have examined or personally know. *Louisville, etc., R. Co. v. Wood*, 12 N. E. Rep. 572.

After detailing the facts he has seen, a medical witness may express an opinion what produced the symptoms he saw. *Louisville, etc., R. Co. v. Wood*, 12 N. E. Rep. 572; *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409; *Van Deusen v. Newcomer*, 40 Mich. 120.

Such opinion may not only rest upon his own knowledge of the patient's condition, or upon a medical examination of him which he has made, but upon a hypothetical case stated to him in court. *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409; *Burns v. Barenfield*, 84 Ind. 43; *Bush v. Jackson*, 24 Ala. 273.

A physician cannot be permitted to decide upon the credibility of witness, nor to take into consideration facts known to him, and not communicated to the jury; but, after having communicated

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such facts in his testimony, he may take them into consideration in forming his opinion. Louisville, etc., R. Co. v. Falvey, 104 Ind. 409; Koenig v. Globe Mutual L. Ins. Co., 10 Hun (N. Y.), 558; Hunt v. Lowell Gas Light Co., 8 Allen (Mass.), 169; Van Zandt v. Mutual Benefit L. Ins. Co., 55 N. Y. 169, 14 Amer. Rep. 215; Bennett v. Fail, 26 Ala. 605; Bush v. Jackson, 24 Ala. 273.

The opinion of medical witnesses may rest in part on statements made by the patient. Upon this subject the authorities are in harmony, although there is some difference of opinion as to whether statements of past symptoms may be taken into consideration. Louisville, etc., R. Co. v. Falvey, 104 Ind. 409; Barber v. Merriam, 11 Allen (Mass.), 322; Towle v. Blake, 48 N. H. 92; Brown v. N. Y. Cent. R. R., 32 N. Y. 597; Quaife v. Chicago, etc., R. Co., 48 Wis. 513; Eckles v. Bates, 26 Ala. 655; State v. Geddicke, 43 N. J. L. 86; Illinois Cent. R. Co. v. Sutton, 42 Ill. 438; Denton v. State, 1 Swan (Tenn.), 279; Aveson v. Kinnaird, 6 East, 188.

They may likewise give their opinion as to the nature of the injuries, based in part on the statements of the injured person in relation to his condition, sufferings or symptoms in the course of their professional examination into the case. Cooper v. St. Paul City R. Co. (Minn.), 58 Am. & Eng. R. Cas. 598, following Jones v. Railway Co., 43 Minn. 281, Johnson v. Railway Co., 47 Minn. 473.

HELMAN

v.

PITTSBURG, C. C. & ST. L. RY. CO.

(Supreme Court of Ohio, May 10, 1898.)

Wrongful Death—Admissions of Deceased as Evidence—Privies*— In the trial of an action brought by an administrator to recover damages, under sections 6134 and 6135, Rev. St., it is competent for the defendant to introduce as evidence what the deceased said while in his right mind after the injury, tending to show that the injury was caused by his own fault, negligence, or carelessness.

(Syllabus by the Court.)

ERROR by plaintiff to Miami county circuit court.
Affirmed.

Sherman Weaver, having a wife and three small children, and being a yard brakeman in the employ of the Pittsburg, Cincinnati, Chicago & St. Louis Rail-

*See note at end of case.

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way Company, received injuries while in the discharge of his duties as such brakeman, at Bradford Junction,, in this state, on the 29th day of August, 1894, and died as a result of such injury, four days thereafter. B. F. Helman was duly appointed administrator of his estate, and sued the railway company for damages, under sections 6134 and 6135, Rev. St., and in his petition averred that the deceased was properly riding a cut of cars on to a certain track; that his superior was negligent in allowing another cut of cars to follow so closely as to overtake and bump against his cut of cars, thereby throwing him off, and causing the cars following to run over him; that his superior did not use ordinary care in the management of the cuts of cars; and that the brake on the cut of cars following his was defective, so that the brakeman upon that car could not properly check up the cut of cars so as to prevent the two cuts coming together. The administrator also averred that, under the laws of Ohio, the said Sherman Weaver would have been entitled to recover against said defendant for his injuries so sustained had death not resulted therefrom. The railway company admitted that it was a corporation; that the deceased had been in its employ; that he was hurt and died at the dates stated; and denied all the other averments of the petition; and averred that the injuries of deceased were caused wholly by his own carelessness and negligence. This was denied by the reply. The widow having received and accepted payment out of the relief department, the action proceeded as an action for the recovery of damages sustained by the children only. The railway company offered evidence tending to prove that on the second day after the injury, and while Mr. Weaver was in good mental condition, he stated in a conversation then had with a Mr. Heaton that at the time of the accident he was standing on the footboard of the car, talking to and watching another employee, who was riding a cut of cars on a parallel track, and that, while so talking and watching the other employee, the cut of cars following him struck his cut, and upset him. Objection being made

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to this evidence, the court sustained the objection, and refused to admit the evidence to be introduced to the jury, to which the railway company excepted, and stated to the court what the witness would testify to if permitted to proceed. A verdict was returned in favor of the administrator. A motion was made for a new trial upon the ground, among others, that the court erred in ruling out said evidence. The motion was overruled, and exceptions taken, and judgment rendered on the verdict. The circuit court reversed the judgment upon the sole ground that the court of common pleas erred in rejecting said evidence. Thereupon the administrator filed his petition in error in this court, seeking to reverse the judgment of the circuit court, and asking that the common pleas be affirmed.

H. H. Williams and *M. K. Gantz*, for plaintiff in error.

Frank Chance and *Charles Darlington*, for defendant in error.

BURKET, J. (after stating the facts). The facts showing that the death was caused by wrongful act, neglect, or default, and that the act, neglect, or default was such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, should appear in the petition; and it is not necessary to aver that, if death had not ensued, the deceased would have been entitled to recover damages against the defendant in respect to his injuries so sustained; but such averment can do no harm. The principal questions to be tried are whether death was caused by wrongful act, neglect, or default, and, if so, if such act, neglect, or default was such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof. If death was not caused by wrongful act, neglect, or default, or, being so caused, the act, neglect, or default was such as would not have entitled the party injured to recover damages if living, the action by the administrator must fail. That

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death was caused by wrongful act, neglect, or default, and that the act, neglect, or default was such as would have entitled deceased to recover damages in respect thereof, are conditions upon which the action provided for in sections 6134 and 6135, Rev. St., are given; and the facts constituting these conditions must be averred in the petition, and established on the trial by competent evidence. If facts are averred in the petition which would entitle the deceased, if living, to recover damages for the injuries by him sustained, and facts are averred in the answer, or denials therein made, which, if true, would prevent a recovery on his part if living, the whole evidence taken together must be of sufficient weight to establish affirmatively the facts constituting the conditions upon which the statute gives the right of action, the burden being on the plaintiff. *Wolf v. Railroad Co.*, 55 Ohio St. 517, 45 N. E. 708. The defendant therefore has the right to introduce any evidence which tends to weaken or disprove the facts necessary to be established to make out the plaintiff's cause, *i. e.* the facts constituting the conditions upon which the action is given by the statute. If death had not ensued, the deceased could not recover damages for his injuries, if it should be established on the trial that his injuries were caused by his own carelessness or negligence; and his statements after the injury, and while in his right mind, tending to show that the injury was caused by his own negligence and carelessness, would be good evidence against him in an action brought in his own behalf during his lifetime. Would it be evidence against his administrator in an action under the statute in behalf of the beneficiaries?

It is contended by counsel for plaintiff in error that there is no privity between the deceased and his administrator and beneficiaries, and that the action by the administrator is a new and independent action, given by the statute, not connected with, nor dependent upon, the right of action of the deceased. This contention is not tenable. The statute must be construed in connection with the common law as it existed at and before

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its passage. While at common law the party injured by the negligence of another had a right of action against such party for damages, such right of action does not survive, but abates at his death. The effect of the statute is to pick up this abated right of action of the deceased, and permit it to be prosecuted by the administrator, for the benefit of the next of kin. It is not a new right of action that is prosecuted by the administrator, but it is the same right of action which the deceased had until his death. Upon the death of the injured party, the right of action, by the force of the statute, passes by succession to the administrator for the benefit of the next of kin. This succession more clearly appears when considered with reference to the defendant. By his wrongful act he caused an injury which caused a pecuniary loss to both the injured party and to his next of kin. The right of action to recover damages in respect to such act rests in the injured party alone so long as he lives, and should he be compensated in his lifetime no action can be maintained by his administrator or next of kin for damages, even though it should be clear that the next of kin sustained a great pecuniary loss by reason of the wrongful act. In such cases the pecuniary loss sustained by the next of kin is deemed compensated by the increase of the estate of the deceased. Should the defendant fail to make compensation to the injured party during his lifetime, the liability to make compensation for the pecuniary injury resulting from the wrongful act, instead of abating as at common law, is, by force of the statute, kept alive; and the administrator succeeds to the right to bring an action upon such liability to recover damages, in the nature of compensation, for the pecuniary loss sustained by the next of kin by reason of such wrongful act. The liability of the defendant to the party injured, and the liability over to the administrator for the benefit of the next of kin, is for the same wrongful act, and is the same liability; and such liability does not exist in favor of the injured party and his next of kin at the same time, but in succession.

Note

There is no new liability created by the statute upon death of the injured party, but the right of succession in the administrator to recover upon the liability already existing is created. So that, when viewed from the standpoint of either the administrator or of the party causing the injury by his wrongful act, there is succession in the right of recovery, which succession is created by force of the statute. And, where there is succession in rights, there is privity between the parties. It therefore follows that the administrator and the beneficiaries stand in privity with the deceased, and that such damages as may be recovered by the administrator are part and parcel of the damages which the deceased had a right to recover during his lifetime. This being so, the administrator, in his action in behalf of the beneficiaries, is bound by the acts and words of the deceased. Whatever he did or said while in his right mind tending to show that the injury was caused by his own fault, neglect, or carelessness is competent evidence against the plaintiff, and in behalf of the defendant. The evidence offered by the railway company, and rejected by the court, was competent and material, and its rejection was prejudicial. The circuit court was right in reversing the judgment and remanding the cause for a new trial. Judgment affirmed.

NOTE.

Death by Wrongful Act—Admissions of Deceased as Evidence.—In an action for the loss of services of plaintiff's minor son, whose death was alleged to have been caused by defendant's negligence, statements of the son as to the cause of the accident, and that he alone was in fault, were held not to be admissible against the plaintiff as admissions, as the right of action is personal to plaintiff, and deceased could not bind him by admissions against his interest; but they were held to be competent as part of the *res gestæ*. Louisville, etc., R. Co. v. Berry, 2 Ind. App. 427.

Ryan v. Northern Pac. Ry. Co

RYAN

v.

NORTHERN PACIFIC RY. CO.

(*Supreme Court of Washington, June 22, 1898.*)

Injury to Stock Within City—Duty to Fence Track.*—The section of the statute declaring the fact that a railroad track is not fenced where stock is killed by a train shall be *prima facie* evidence of negligence on the part of the company, is not applicable where stock is so killed within an incorporated town.

Questions of Fact—Appeal.—The questions as to whether defendant was negligent in not sooner discovering the stock upon the track, or was negligent after such discovery, being questions of fact, and having been submitted to and determined by the lower court, will not be considered on appeal.

APPEAL by plaintiff from Pierce county superior court. *Affirmed.*

Murry & Scott, for appellant.

A. G. Avery and *Crowley & Grosscup*, for respondent.

DUNBAR, J. This action was brought by appellant against the respondent, a railroad corporation, to recover damages for carelessly and negligently killing two cows within the corporate limits of the town of Buckley. The jury was waived, and the case was submitted to the trial court upon an agreed statement of facts. The court rendered judgment against appellant for costs, and an appeal is taken from such judgment to this court. The agreed statement of facts is to the effect that the respondent is a duly-organized corporation; that the town of Buckley is a duly-incorporated town; and that the cows came upon the track of the defendant, and were killed by being run into by a passenger train within the corporate limits of the town of Buckley, at a place about 500

*See note at end of case.

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feet distant from the depot, and within the switch limits thereof. The following are the *verbatim* stipulations of the important facts: "That within said switch limits is situated a depot building and platform, with the main track passing in front thereof in a straight line for a distance of about a quarter of a mile on either side of said depot, and a side track or switch passing in front of said depot building about ten feet beyond the main track, and parallel therewith, for a distance of nearly a quarter of a mile on either side of said depot building. That said depot, depot grounds, and tracks are so laid out and constructed for the convenient transaction of the business of said defendant company at said town, and are regularly used and are necessary for the accommodation of the public in the receiving and discharging of freight and passengers at said station, and were the usual and ordinary style of depot and station grounds used by said railway company along its line of road for such purposes at similar towns. That said station grounds were used by the public constantly in passing to and fro over and across the same, and the main public street of said town crosses said tracks and grounds next to said depot building. That it would be difficult for said company to control and transact its business if it were to fence its track at said place, and would interfere with its operation of its road and transaction of its business, and would greatly inconvenience the general public in traveling and doing business with said company, and would require the construction of cattle guards, which would increase the peril to the lives of the employees of said company. That said cows, just prior to the accident, were lying down on the left-hand side of the main track, about ten feet from it, without the knowledge of plaintiff. That when the engine was within about 150 feet of said cows, they suddenly got upon the main track, and ran in front of the engine for a distance of about 100 feet before they were struck by the engine, and that said cows were running at their utmost speed until so struck. That the engineer of said

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train was occupying his usual place on the right-hand side of the engine, and said engineer did not see said cows until they got upon the track. That said track was straight, and the view thereof unobstructed, for a distance of 2,000 feet from the place where said cows were lying, and said cows were in plain sight from said engine at said distance. That said train was running at the rate of about fifteen miles per hour, and said engineer made no attempt to slacken the speed thereof, or to stop said train; neither did he blow the whistle nor ring the bell, considering, in the exercise of his best judgment, that such action would have been of no avail. That said rate of speed was the usual rate of speed at which passenger trains were accustomed to enter and pass said station. That at the rate of speed said train was running it could have been safely brought to a standstill within a distance of 600 feet. That there was nothing on either side of the main track to prevent said cows from getting off the track, and said cows could have remained where they were with perfect safety, and without being in a dangerous position. That it is lawful for stock of all kinds to run at large within the corporate limits of the town of Buckley. That it is dangerous for a train to strike an animal or like object upon the track when going at a slow rate of speed, as it is more liable to derail and wreck the train than when going at a greater rate of speed, so that the object may be struck with sudden force and thrown from the track. That said track and said station grounds were not fenced, so as to turn cattle away from the same."

Appellant claims that negligence may be predicated in this case upon one or more of the following grounds: (1) Failure of respondent to fence the track, thereby imposing *prima facie* evidence of negligence under the statute; (2) failure of engineer to observe cattle at a sufficient distance to have stopped the train or sounded an alarm; (3) failure of engineer, after cattle jumped upon the track, to blow the whistle or ring the bell, or endeavor to stop the train; (4) negligence in rate of

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speed at which train was running. Section 1, ch. 128, Sess. Laws Wash. 1893, reads as follows: "That in all actions against persons or corporations owning or operating steam railways in the state of Washington, for injuries to stock of any kind, except hogs, by collision with moving trains, it shall be *prima facie* evidence of negligence on the part of the defendant to show that the railroad track was not fenced so as to turn said stock from the track." It is contended by the appellant that incorporated towns are not excepted from the provisions of this act in relation to fencing, and several cases are cited to sustain the contention. An examination of them, however, convinces us that they are not in point, but that they were adjudications in states where there was an express statute demanding the fencing by railroad companies of their tracks, and it will be observed that there are no special provisions in our statute. The first case cited, *viz.* Railroad Co. v. Shaft (Kan.), 6 Pac. 908, was construing an express provision of the statute requiring it to inclose its roads with a good and lawful fence, and it was held that, except where some paramount interest of the public intervenes, or some paramount interest or duty to the public rests upon the railroad company, an exception would not obtain, and that no private interest or convenience or inconvenience on the part of the railroad company would alone be sufficient to absolve it from fencing its road where the statute in express terms required that the road should be fenced. The cases generally are collated and discussed in this opinion, and in all of them there are implied exceptions, and a great

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many cases are cited holding that, as a rule, the company is not obliged to construct fences within the limits of incorporated cities or towns; and the cases holding to this rule, especially under statutes like ours, are so numerous and so overwhelming, and so almost universally establish the rule, that citations are unnecessary. So that in this case the statute does not even impose upon the respondent the burden of proof to show a

Note

lack of negligence on their part, but leaves the case to be decided upon the general principles of law applicable to such cases in the absence of rules of evidence established by statute.

The questions whether, under the circumstances as shown by the stipulated facts, the engineer was guilty of negligence in not discovering the cattle before he did, or whether he was guilty of negligence in his conduct of the train after the discovery of the cattle, are questions of fact which were submitted to the lower court; and, the court having found that no negligence had been committed by the engineer, in respect to the questions mentioned, this court, under the general rule which it has so often announced in cases of this kind, will not disturb its findings. There being nothing in the statement of facts which, as a question of law, could be determined to be negligence on the part of the respondent, the judgment will be affirmed.

Questions of Fact
—Appeal.

SCOTT, C. J., and REAVIS and GORDON, JJ., concur.

NOTE.

No Duty to Fence Track Within City Limits.—It is often expressly provided by statute that a railroad company need not fence its road within the limits of incorporated towns. In some states the same conclusion is reached as an implied exception to the general terms of the statute. *Davis v. Burlington*, etc., R. Co., 26 Iowa, 549; *Rogers v. Chicago*, etc., R. Co., 26 Iowa, 558; *Meyer v. North Missouri R. Co.*, 35 Mo. 352; *Iba v. Hannibal & St. Jo. R. Co.*, 45 Mo. 470; *Ellis v. Pacific R. Co.*, 48 Mo. 231; *Edwards v. Hannibal*, etc., R. Co., 66 Mo. 571; *Cousins v. Hannibal*, etc., R. Co., 66 Mo. 572; *Elliott v. Hannibal*, etc., R. Co., 66 Mo. 683; *Illinois*, etc., R. Co. *v. Williams*, 27 Ill. 49; *Ohio*, etc., R. Co. *v. Irwin*, 27 Ill. 178; *Chicago*, etc., R. Co. *v. Rice*, 71 Ill. 567; *Toledo*, etc., R. Co. *v. Spangler*, 71 Ill. 568; *Indiana, B. & W. R. Co. v. Leak*, 89 Ind. 596, 13 Am. & Eng. R. Cas. 520; *Wymore v. Hannibal*, etc., R. Co., 79 Mo. 247, 13 Am. & Eng. R. Cas. (Mo.), 524; *Lloyd v. Pac. R. Co.*, 49 Mo. 199. Compare *Greeley v. St Paul*, etc., R. Co., 33 Minn. 136, 19 Am. & Eng. R. Cas. 559.

See *Evans v. Sherman*, etc., Ry. Co. (Tex. Civ. App.), 5 Am. & Eng. R. Cas., N. S., 184, and *note*, p. 187.

Croft v. Chicago G. W. Ry. Co

CROFT

v.

CHICAGO G. W. RY. CO.

(Supreme Court of Minnesota, April 22, 1898.)

Killing Cow in Street—Contributory Negligence.—It appeared from the evidence that plaintiff's cow was killed by defendant's train while being driven across the track at an intersecting street; that the track was not fenced; that there were no cattle guards nor signboards, and that the train was running rapidly, and was fifteen minutes behind time. *Held*, that such evidence did not establish contributory negligence on the part of plaintiff.

Same—Fencing Track—Cattle Guards.*—In Minnesota railroads are required to fence their roads and to build cattle guards at wagon crossings, and this rule applies as well within the limits of incorporated cities and villages as to the country.

Same—Obstructed View—Signals.—Where the view of approaching trains from a crossing is materially obstructed, a railroad company must take special care to give timely warnings of its approaching trains, whether signals are required by statute or not.

APPEAL by defendant from municipal court of St. Paul. *Affirmed.*

Dan W. Lawler and John M. Blakeley, for appellant.

John V. I. Dodd, for respondent.

BUCK, J. Plaintiff's cow was killed by defendant's railroad train at or near where its track crosses Annapolis street, in the city of St. Paul. The train was 15 minutes behind its usual and regular time, and running rapidly, when the accident occurred. The track was not fenced, and there were no cattle guards at the crossing, so far as appears from the evidence. The defendant did not ring any bell, blow any whistle, or give any signal of danger, when approaching or crossing said street. There were no signs of warning or signal boards at this crossing.

Case Stated.

*See *Ryan v. Northern Pac. Ry. Co.*, *ante*, and *note*.

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The issue involved the question of ownership of the cow, the negligence of the defendant, and the contributory negligence of the plaintiff. The evidence of plaintiff's ownership of the cow was rather meager, and not very satisfactory, but not so entirely insufficient as to justify a reversal of the finding of the jury upon this point. We find no warrant for the defendant's contention that the plaintiff was guilty of contributory negligence. The cow was on a public highway, being taken by plaintiff's son to the pasture on the opposite side of the street from where she resided. She supposed the train had already passed, as it was about a quarter of an hour later than its usual time of passing over this crossing. Railroads are required, under Gen. St. 1894, § 2692, to fence their roads and to build cattle guards at wagon crossings, and this rule applies as well within the limits of incorporated cities and villages as to the country. *Greeley v. Railway Co.*, 33 Minn. 136, 22 N. W. 179. There is an exception where public necessity or convenience requires it, such as station or depot grounds; and the burden of showing that it is not bound to fence or build cattle guards in cases of this kind rests upon the railway company. *Cox v. Railway Co.*, 41 Minn. 101, 42 N. W. 924. But we are of the opinion that the evidence justified the jury in finding defendant did not exercise such care as was commensurate with the hazards which might reasonably be anticipated at such a crossing. While Annapolis street had not been graded so as to admit of a convenient passage of vehicles, it was opened and used by the public more or less for other purposes. There was evidence from which the jury might have properly found that the view of an approaching train from the crossing was to a considerable extent obstructed, and in such case a railroad company must take special care to give timely warning of its approaching train, and it is negligence for it not to do so, whether signals are required by

Killing Cow in
Street—Contribu-
tory Negligence.Same—Fencing
Track—Cattle
Guards.Same—Obstructed
View—Signals.

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statute or not. 4 Am. & Eng. Enc. Law, p. 918, subd. 15. While there may have been no statutory duty (Gen. St. 1894, § 6637) to ring a bell or blow a whistle, it does not necessarily follow that the failure to do so was not negligent. *Czech v. Railway Co.*, (Minn.) 70 N. W. 791. That no signal was given was one of the facts characterizing the accident, and it was one of the circumstances which, in connection with others, the jury had a right to take into account in determining whether the defendant was negligent. There was no error in admitting evidence of the facts. Order affirmed.

ATCHISON, T. & S. F. R. Co.

v.

HAYS.

(*Court of Appeals of Kansas, S. Dept., C. D., Sept. 21, 1898.*)

Witnesses—Use of Memorandum to Refresh Memory.—Any writing used by a witness to refresh his memory must be produced and shown to the adverse party, if he requires it, who may cross-examine the witness thereon.

Fires Set by Engines—Combustibles on Right of Way—Jury.—Where the jury find that the railroad company is only negligent in allowing the accumulation of combustible material upon its right of way, the said company is not prejudiced by the refusal of the court to compel the jury to answer special questions relating to other items of negligence.

Same—Negligence—Precedents.—Distinctions are to be made between the decisions of the supreme court upon the questions of negligence arising prior to the passage of the law of 1885 upon that subject, and the acts of negligence arising subsequent to its passage.

Same—Damages.*—The plaintiff's recovery for damages to real estate by fire caused in the operation of a railroad is limited to the actual diminution in the value of the realty; but, while this may be shown either on cross-examination of the plaintiff's witness or as a matter of defense, it does not prevent proof by the plaintiff of the value of the thing destroyed as a part of the realty.

No objection will be considered, unless the grounds thereof are stated.

(Syllabus by the Court.)

*As to Damages for Fires Set by Engines, see *Atchison, T. & S. F. R. Co. v. Emmerson* (Kan.), 8 Am. & Eng. R. Cas., N. S., 663, and *note*, p. 665; *Missouri, etc., Ry. Co. v. Lyan* (Kan.), 6 Am. & Eng. R. Cas., N. S., 781, *abs.*, 47 Pac. Rep. 526.

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ERROR by defendant from Cowley county district court. *Affirmed.*

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error.

Pollock & Lafferty, for defendant in error.

DENNISON, P. J. This action was commenced in the district court of Cowley county, Kan., by the defendant in error to recover from the plaintiff in error the damages sustained by him in the burning of fruit trees and a hedge which were growing upon his farm, near Winfield. The petition alleges that the fire which caused the damage was caused by the plaintiff in error, in the negligent operation of its railroad. Verdict and judgment for plaintiff below in the sum of \$891.50 as damages, and \$150 attorney's fees, and the railroad company brings the case here for review.

Case Stated.

Council for plaintiff in error contend that the court erred (1) in permitting the introduction of certain testimony; (2) in the giving of certain instructions; (3) in refusing to give certain instructions; (4) in discharging the jury without requiring them to answer certain questions; (5) in refusing to render judgment for plaintiff in error upon the special findings of the jury; (6) in overruling the motion of the plaintiff in error for a new trial.

The testimony complained of was in permitting the cross-examination of the witness Hawkins as to the contents of a report from which he refreshed his memory during his examination in chief. In Steph.

Dig. Ev. art. 137, it is said: "Any writing referred to under article 136 [to refresh memory of witness] must be produced and shown to the adverse party, if he requires it; and such party may, if he pleases, cross-examine the witness thereupon." See 7 Am. & Eng. Enc. Law, 111.

Witnesses—Use of
Memorandum to
Refresh Memory.

We have carefully examined the instructions given by the court, as well as those refused, and have followed closely the argument of council thereon, and

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conclude that the court fairly and fully instructed the jury upon the law as applicable to the pleadings and the evidence.

The special questions to which the jury made the answer, "Don't know," all relate to the competency and skill of the engineer, and the condition of the engine and its appliances to prevent the escape of fire. We think the jury

Fires Set by Engines—Combustibles on Right of Way—Jury.

could have answered these questions under the evidence, and should have been required to do so. However, the jury found that the negligence of the company consisted of "allowing accumulation of grass and combustible material on its right of way." We cannot, therefore, say that the plaintiff in error was prejudiced by the refusal of the court to require answers to the questions.

Counsel for plaintiff in error contend that, as the jury found that the company was only negligent in allowing the accumulation of grass and other combustible material upon its right of way, the company is not guilty of such negligence as would make it liable, and cites *Railroad Co. v. Butts*, 7 Kan. 308, and *Railroad Co. v. Riggs*, 31 Kan. 622, 3 Pac. 305. These decisions were made prior to the passage of the law of 1885, which provides that it shall only be necessary for the plaintiff to show that the "fire complained of was caused by the operation of said railroad, and the amount of his damages," to make a *prima facie* case of negligence against the railroad company, and hence are not applicable in this case.

Same—Negligence—Precedents.

Counsel for plaintiff in error also contend that the motion for a new trial should be sustained for the reason that the plaintiff below tried the case upon the wrong theory as to the measure of damages. Hays owned the land, and the trees were permanent improvements. The damages were found by evidence as to the number of trees destroyed and the value of each tree, and the rods of hedge destroyed, and its value, instead of the value of the land before and after the fire. It was held by the su-

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preme court in *Railway Co. v. Lycan* (Kan. Sup.) 47 Pac. 526, that the plaintiff's recovery would be limited to the actual diminution in the value of the realty, but that while this may be shown either on cross-examination of the plaintiff's witnesses, or as a matter of defense, it does not prevent proof by the plaintiff of the value of the thing destroyed as a part of the realty. The plaintiff in error in this case made no attempt to show the diminished value of the realty in any way, and made no proper objection to the introduction of evidence as to the value of the trees and hedge. The only objection made was, "Defendant objects to the question, and to the competency of the witness to answer the question." No objection will be considered, unless the grounds thereof are stated. The only objection is therefore as to the competency of the witness to answer the question. The judgment of the district court is affirmed. All the judges concurring.

LOUISVILLE & N. R. Co.

v.

ANCHORS.

(Supreme Court of Alabama, May 1, 1897.)

Collision—Killing Engineer of Other Train—Pleading Willful Negligence.—A count in a complaint which alleges that a collision at plaintiff's crossing was the result of the wanton and willful failure of defendant's engineer to give the statutory signals, but fails to allege that the purpose of such failure was to cause such collision and fails to allege that defendant's engineer was chargeable with notice that the collision would result from such failure, does not allege willful injury.

Definition of "Reckless".*—The term "reckless" when applied to negligence has no legal significance which imports other than simple negligence or a want of due care.

Pleading Simple Negligence.—A count which charges that defendant's engineer negligently permitted and suffered his locomotive to collide with plaintiff's train is good as a count for simple negligence.

*See notes at end of case.

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Pleading Willful Negligence.—A count which alleges that an injury was caused by willfully running a train at a high rate of speed, but fails to allege that the purpose of such conduct was to inflict the injury, and fails to allege that the person so doing was chargeable with notice that the injury would result from such conduct, is bad as a count for willful injury.

Same.—But a count which alleges that defendant's engineer willfully caused defendant's train to collide with plaintiff's train alleges a willful injury.

Electric Railway "A Railroad."*—An electric railway is a railroad within the meaning to the law of Alabama which declares that trains must be stopped within 100 feet of the intersection of two railroad tracks until those in charge see that the way is clear, and that the train on the railroad having the older right of way is entitled to cross first.

APPEAL by defendant from Anniston city court.
Reversed in part.

The complaint contained 10 counts. The first count of the complaint was as follows: "The plaintiff claims of the defendant the sum of twenty-five thousand dollars, for that heretofore, to wit, on the 4th day of July, 1896, the defendant was a railroad company, and a common carrier, operating a railroad which passes through the city of Anniston, and, in passing through the said city, it ran over and across Eleventh street, a public street in said city; that running along Eleventh street is an electric car line called the 'Oxford Lake Line,' which runs from Anniston to Oxford Lake, a point four miles distant from Anniston, within Calhoun county, and beyond the corporate limits of any town, city, or village; that the said Oxford Lake Line is engaged in the business of transporting freight and passengers between Anniston, Oxford, and intermediate points; that on the night of the said July 4th the defendant company was running and moving a passenger train drawn by a steam locomotive over its said line, and passing through said city, and along and across the said Eleventh street, and across the track of the said Lake Line; that Anniston is a regular station or stopping place on the line of the defendant's said railroad; that the crossing of the defendant's said line with that of the Oxford Lake Line, on Eleventh street, is more

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than a half a mile in every direction, and is within a quarter of a mile of the regular station or stopping place on the line of the defendant's railroad; that the ordinances of the city of Anniston provide that no person shall run or cause to be run any car, engine, or railroad train within the corporate limits of the city of Anniston faster than six miles per hour, or run any railroad train, car, or engine over any street crossing within the corporate limits of said city without continually ringing a bell over and between said crossing. And plaintiff avers: That the said defendant, in running its said passenger train at the time and place as aforesaid, ran into and collided with a passenger car of said Lake Line at the place where its railroad crosses the railroad of defendant, knocked the passenger car of said Lake Line off the track, and struck and killed plaintiff's intestate, who was the conductor on the said car of the Oxford Lake Line, while the said car was running along the track of the said Oxford Lake Line's railroad. That the death of plaintiff's intestate was caused by the negligence of defendant in this: That (1) Robert Wallace, defendant's engineer on said passenger train, failed to blow the whistle or ring the bell at least one-quarter of a mile before reaching said crossing with Eleventh street, and in failing to continue to blow the whistle or ring his bell at short intervals until said train had passed said crossing. (2) Said Wallace failed to ring his bell or blow his whistle at least one-quarter of a mile from the regular station or stopping place of said defendant's trains at Anniston, and in failing to continue said ringing or blowing at short intervals until such station or stopping place was reached. (3) Said Wallace failed to ring his bell at short intervals while moving within the corporate limits of the city of Anniston. (4) Said Wallace and one Hiram Meigs, who was defendant's conductor on said passenger train, ran or caused to be run the said train of defendant in the corporate limits of the city of Anniston at a greater rate of speed than six miles per hour, and without con-

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tinually ringing the bell within the said corporate limits of Anniston, and while running over and between the crossing of said Eleventh street with defendant's railroad, by reason of all which negligence on the part of the defendant, plaintiff was damaged in the said sum of twenty-five thousand dollars." The third, fourth, fifth, seventh, eighth, and ninth counts of the complaint charge the defendant with simple negligence, while the second, sixth, and tenth counts sought to allege that the injury was willfully inflicted or resulted from such wanton negligence as to be the equivalent of a willful wrong. The allegations of the second and tenth counts are sufficiently stated in the opinion. The sixth count was as follows: "Plaintiff claims of the defendant the other and further sum of twenty-five thousand dollars as damages, for that heretofore, to wit, on the fourth day of July, 1896, defendant was running and moving a passenger car over a line of railroad that it was operating in and beyond the corporate limits of the city of Anniston, an incorporated town or city; that, while the said passenger car was moving within said corporate limits, it ran into and against a passenger car of the Oxford Lake Line; that plaintiff's intestate was the conductor on said last-named passenger car; that the ordinances of the city of Anniston prohibit any person from running or causing any railroad train, car, or engine [to run] at a faster speed than six miles an hour; that defendant's agents and servants Hiram Meigs and Robert Wallace, conductor and engineer on said defendant's train, were willfully or wantonly running defendant's said train at a greater rate of speed than six miles per hour, and, by reason of such speed, they willfully or wantonly ran into and against the car on which plaintiff's intestate was the conductor, knocked the said car off its track, and struck and killed plaintiff's intestate, plaintiff's intestate's death being caused by the said willfulness or wantonness in running said train of defendant's at such a high rate of speed, to the damage of the plaintiff in the sum of twenty-five thousand dollars." To the first, third, fourth, fifth, seventh,

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eighth, and ninth counts of the complaint the defendant separately demurred, upon the grounds (1) that they stated no cause of action; (2) that it does not appear from said counts that the alleged negligence of the defendant was the proximate cause of the injury to plaintiff's intestate; (3) that it does not appear from the facts that the defendant was guilty of negligence. To the second, sixth, and tenth counts of the complaint the defendant demurred, upon the grounds (1) that they state no cause of action; (2) that no sufficient facts are stated to show that the plaintiff's intestate was injured by reason of the wanton, careless, or willful negligence of the defendant or its agents; (3) that the facts stated do not show that the defendant or its agents willfully or wantonly or negligently caused the defendant's locomotive to strike the deceased or cause the injuries. These demurrers were overruled by the court, and from the judgment overruling these demurrers the defendant appeals, and assigns as error the rendition of such judgment.

John B. Knox, for appellant.

Corthel & Agee, for appellee.

COLEMAN, J. The defendant in error, as administratrix, sued to recover damages for an unlawful injury to J. F. Anchors, which resulted in his death. Each of the 10 counts of the complaint were demurred to by the defendant, and there were several grounds of each of the demurrers. The demurrer to the second, sixth, and tenth counts raises the question as to whether these counts charge that the injury was willfully inflicted, or resulted from such wanton negligence as to be the equivalent of a willful wrong. The court overruled the demurrer, which challenged the sufficiency of these counts in this respect. We are of opinion the pleader and the trial court misapprehended nature of a willful injury or wanton negligence, as defined by this court. In the case of *Railway Co. v. Lee*, 92 Ala. 262, 9 South. 230, it was said: "Willful and intentional wrong, a

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willingness to inflict injury, cannot be imputed to one who is without consciousness, from whatever cause, that his conduct will inevitably or probably lead to wrong and injury." In the case of *Electric Co. v. Bowers*, 110 Ala. 328, 20 South. 345, we said: "To constitute willful injury, there must be design, purpose, intent to do wrong and inflict the injury." "In wanton negligence, the party doing the act or failing to act is conscious of his conduct, and, without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will naturally or probably result in injury." *Railroad Co. v. Webb*, 97 Ala. 308, 12 South. 374; *Stringer v. Railroad Co.*, 99 Ala. 397, 13 South. 75; *Railroad Co. v. Vance*, 93 Ala. 149, 9 South. 574; *Railroad Co. v. Richards*, 100 Ala. 365, 13 South. 944. Apply these principles to the tenth count of the complaint: It avers that "defendant's engineer Robert Wallace, who had control of the running of the locomotive that propelled said train, wantonly or willfully failed to blow the whistle or ring the bell at least one-fourth of a mile before reaching the regular station or stopping place at Anniston, and said engineer wantonly or willfully failed to continue to ring the bell or blow the whistle at short intervals until he had reached the said stopping place, and, *because of such* willfulness or wantonness, the said passenger train of the defendant ran into and against a passenger car of the Oxford Lake Line, at its crossing," etc. (*Italics ours.*) Everything averred in this count might be true, and yet not show that the purpose of the defendant in failing to ring the bell or blow the whistle was to run into and against the passenger car of the Oxford Lake Line. As a count for willful injury it is defective. Nor does the count aver a state of facts from which a knowledge could be imputed to defendant that the natural and probable consequences of his conduct would result in a collision. If the count had averred that defendant willfully failed or refused to blow the whistle or ring the bell with the intent to commit the injury, or willfully refused to ring the bell, having a knowledge that probably the Oxford

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Lake train at the same time was at the crossing, and the nature or probable result of the willful omission would be to collide, the count would have been sufficient. It may be true that the injury resulted "because of such willfulness" in failing to ring the bell, "or by reason of such speed," as averred in the sixth count, or "whereby," as averred in the second count, and yet the result may not have been within the design or purpose of the engineer of the defendant, nor done or omitted under such circumstances and conditions as would charge him with a knowledge that the natural or probable consequences of his conduct would be to inflict injury. We would call attention to the use of the word "reckless" in the second count. In the case of *Railroad Co. v.*

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"Reckless."

Crocker, 95 Ala. 412, 433, 11 South. 262, we considered and declared the distinction between the words "willful" and "reckless"; and in the case of *Stringer v. Railroad Co.*, 99 Ala. 397, 13 South. 75, we declared that the words "gross," "reckless," *per se*, "when applied to negligence, have no legal significance which import other than simple negligence or a want of due care." The use of the word "reckless," in connection with averments of facts to which it refers and explains, may imply more than mere heedlessness or negligence.

The fourth count charges that Robert Wallace "negligently * * * permitted and suffered the said locomotive and train to run into and against a passenger car." This averment is sufficient as a count for simple negligence. The legal effect would not be different if the word "recklessly" had been substituted for the word "negligently" in this count. *Railroad Co. v. Hall*, 105 Ala. 599, 17 South. 176.

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Negligence.

Construing the sixth count, our opinion is the latter clause gives meaning to and controls the preceding averments, and, construed as a whole, charges no more than that the death of plaintiff's intestate resulted "by reason of" the willful running of said train at a high rate of speed, but does not aver that the intention or purpose in running the train

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Negligence.

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was to inflict the injury; nor does it aver facts which show that defendant knew that the probable result of such conduct would be to inflict injury. Hall Case, *supra*. The demurrer to the sixth and tenth counts should have been sustained.

The second count charges that the defendant "willfully caused the locomotive and train to run into and against a passenger car," etc. A similar averment was held sufficient to show a willful injury in the case of Railroad Co. v. Jacobs, 92 Ala. 187, 9 South. 320. It may be that this count is objectionable in that it unites averments of simple negligence with averments showing a willful injury, but no objection was raised on this account, and the demurrer to it was properly overruled. Railroad Co. v. Markee, 103 Ala. 160, 15 South. 511.

Section 1145 of the Code of 1886 provides as follows: "When the tracks of two railroads cross each other, engineers and conductors must cause the trains of which they are in charge to come to a full stop within one hundred feet of such crossing, and not proceed until they know the way to be clear; the train on the railroad having the older right of way being entitled to cross first." The demurrer raises the question as to whether "the railroad of the Oxford Lake Line, an electric railroad running from Anniston to a point beyond the corporate limits of the city, upon which the plaintiff's intestate was conductor," is a railroad, within the meaning of said section 1145. In the case of Railroad Co. v. Jacobs, 92 Ala. 199, 9 South. 320, we had occasion to consider sections 1145 and 1173. The question in that case was whether railroads using dummy engines, and operated beyond city limits, were subject to these provisions. After careful deliberation, this court reached the conclusion that railroad corporations organized under and by virtue of sections 1918 and 1921 of the Code of 1886, as amended by the act of February 25, 1887 (Acts 1886-87, p. 144), were not strictly street railways, as contemplated in the statute providing for the organization and operation of street railroads (sections 1603-1612, Code

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"A Railroad."

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1886), and that railroads organized under the act of February 25, 1887, *supra*, using dummy engines, were subject to said statutory provisions. The question now is whether a railroad upon which electricity is used as the moving power is a railroad, within the provisions of the statute. The statute itself makes no distinction, and, in considering the purposes intended in the adoption of these regulations, we are unable to see any good reason why persons traveling upon electric cars are not entitled to the same protection as those traveling upon cars propelled by steam. Public necessities, even within city limits, demand increased facilities for travel over the horse car; and many decisions of courts applicable to street railways operated by horses could not be applied without manifest injustice to trains operated by steam or electricity. The speed, economy, and convenience afforded by electricity commend its use even for commercial purposes, as well as travel, as superior in some respects to any other motive power thus far applied. A railroad within the provisions of the statute does not cease to be such railroad because it may discontinue the use of steam, and substitute that of electricity. The change in the motor power may relieve it from some provisions of the statute, but those which are needful for the protection of life and property continue in force. *Jacobs Case*, *supra*, and authorities cited; *Electric Co. v. Baylor*, 101 Ala. 498, 13 South. 793. Reversed and remanded.

NOTE.

Definition of "Reckless" When Applied to Negligence.—In pleading the words "gross negligence and recklessness" cannot be substituted for "willfulness", and if in evidence the conduct intended to be represented by these words can amount to willfulness, it cannot be so made available under a pleading which does not charge willfulness. *Chicago and Eastern Illinois R. Co. v. Hedges*, Adm'x (Ind.), 25 Am. & Eng. R. Cas. 550.

On a prosecution for disturbing religious worship (*Alabama Code* § 4038), the evidence showing that the defendant, while under the influence of liquor, went into a church after the services had begun, talked loud enough to attract attention, used profane language, and

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said that he could pray as well as the preacher and would do it, a charge instructing the jury that they must find him not guilty, "if they believe from the evidence that what he said and did was said and done heedlessly, or recklessly—that is, carelessly, without thinking of the probable consequences"—is properly refused. *Johnson v. State*, 92 Ala. 82. The court in this case said: "Defendant requested the court to charge the jury, 'that if they believed from the evidence that what the defendant did and said in the church, on the night on which he is charged with having disturbed religious worship, was done and said heedlessly, or recklessly—that is carelessly—without thinking of the probable consequences of what he said and did, they will find the defendant not guilty.' This charge was refused, and defendant excepted. We suspect this charge was asked on the supposed authority of *Harrison v. State*, 37 Ala. 154, and the note appended to section 4033 of the Code. This is a misapprehension of this court's ruling. The trial court, in that case, had instructed the jury that they could convict, if the disturbance was either willfully or recklessly done. This court ruled that the circuit court erred in giving that charge, because the statute punished only a willful disturbance. We drew a distinction between the words willful and reckless, and held that recklessness did not necessarily imply willfulness. A grossly careless act may be characterized as reckless, and serious consequences may result from it. Yet, such consequences would not necessarily be willfully brought about. We, in *Harrison's* case, simply asserted that the word reckless is not the synonym of the statutory word willful, and therefore, the circuit court erred in asserting disjunctively that it was enough if the disturbance was willfully or recklessly done. We decided that there might be recklessness without willfulness. We are now asked to declare that, if there is recklessness, there cannot be willfulness. We cannot assent to this. An act may be careless, heedless, rash, reckless, and still be willful." In *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531, an action for damages brought by the plaintiff for injuries alleged to have been caused by running defendant's engine "recklessly and wantonly over and upon him," defendant's counsel contended that "recklessly and wantonly" were not synonymous with "purposely and willfully;" and that, therefore, the plaintiff meant to charge defendant with negligence only; but the court held that "in popular use and by our decisions 'recklessness' and 'wantonness' are stronger terms than mere or ordinary negligence, and therefore if a person recklessly or wantonly injures another, such person may be subject to damages, even if the other party has been guilty of some negligence or is a trespasser."

Whether "Railroad" Includes Street Railway.—See 7 Am. & Eng. R. Cas., N. S., 552, *note*.

Rierson v. St. Louis, etc., Ry. Co

RIERSON

v.

ST. LOUIS & S. F. RY. CO.

(*Supreme Court of Kansas, Jan. 8, 1898.*)

Right of Way—Grant of Public Lands—Construction of Statute.—The lands which the Great and Little Osage Indians ceded to the United States by the second article of the treaty concluded September 29, 1865, are public lands, within the meaning of "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875; and, where a railroad company, with a view of obtaining a right of way over such lands, made compliance with the requirements of the act before a sale or disposal of the lands by the United States, it acquired a right of way for its railroad.

Same.—Where the secretary of the interior has decided that a railway company is entitled to a grant, and has approved a map and profile presented on behalf of the company, it may be presumed that the preliminary steps necessary to such decision and approval have been taken.

(Syllabus by the Court.)

Error by plaintiff from Greenwood county district court. *Affirmed.*

Hodgson & Hodgson, for plaintiff in error.

C. Hamilton and John L. Hunt (Gleed, Ware & Gleed and D. Palmer, of counsel) for defendant in error.

JOHNSTON, J. This was an action by Winston Rierson to recover from the railway company a strip of land which had been used as a right of way for its railroad since the early part of the year 1880. The land over which the right of way was located Case Stated. was a part of that ceded to the United States by the Great and Little Osage Indians through the treaty concluded on September 29, 1865, and proclaimed by the president on January 21, 1867. With a view of purchasing the land from the United States, Rierson settled upon it in September, 1880, some time after the right

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of way was granted, and the railroad was in operation over the land in question. On June 6, 1888, Rierson received from the United States a patent for the land settled upon, no exception being made of the easement for right of way, and he has been continuously in the possession of the land since that time, except the part used as the right of way. The St. Louis, Wichita & Western Railway Company was duly incorporated in 1879, and in August and September of that year it surveyed its road and located its right of way over the lands in controversy, and in March, 1880, completed the construction of its railroad across the same. Prior to March 16, 1880, the railway company proceeded to obtain a right of way over the land in accordance with the requirements of "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875, by filing a copy of its articles of incorporation and due proofs of its organization thereunder; all of which were duly approved. Subsequently, and before June 1, 1888, the company filed a map and profile of its road, and on the day last mentioned they were approved by the secretary of the interior. The railway company continued to operate its railroad until the transfer of the same, together with all its property and franchises, to its successor, the St. Louis & San Francisco Railway Company, which since that time has continuously operated the railroad. The trial court found that the railway company acquired its right of way by the proceedings taken in 1880, and that Rierson took his title from the United States subject to the easement which the company had previously acquired.

In our view, a correct conclusion was reached. According to the findings of the trial court, the rights of the railway company were acquired before settlement was made on the land by the plaintiff, or any rights therein were obtained by him. He insists that this, with other findings, is not supported by the testimony, but, as the case made does not show that it contains all the evidence, we must accept the facts as stated in the findings.

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There is a contention that the lands ceded are not public lands, within the meaning of the act under which the railway company claims to have acquired its rights, and therefore no right of way was ever obtained by it. As will be observed, the lands were ceded to the United States to be surveyed and sold under the direction of the commissioner of the general land office at a price not less than \$1.25 per acre, as other lands are surveyed and sold, under such rules and regulations as the secretary of the interior should from time to time prescribe. The proceeds of the sale, less the expenses incurred, were to be placed in the treasury of the United States to the credit of the Indians, and were to be thereafter expended for purposes mentioned in the treaty. There was a provision that the Indians should remove from the ceded lands within six months after the ratification of the treaty, and should settle upon their diminished reservation. The Indians having surrendered the right of occupancy, and ceded their lands to the United States, with power of sale and disposal, there can be no doubt that the general government had power to grant a right of way over the lands. By the act of March 3, 1875, it was enacted "that right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory," etc. 1 Supp. Rev. St. 1891, p. 91. Can the ceded lands be regarded as public lands within the meaning of this act? It has been held that "the words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*, 92 U. S. 763; *Bardon v. Railroad Co.*, 145 U. S. 535, 12 Sup. Ct. 856. By the terms of the treaty the ceded lands were to be sold by the United States as other public lands were sold, and, as they must be sold under general laws and regulations, they fall fairly within the definition of public lands given by the supreme court of the United States. See, also, *Roberts v. Railway*

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Co., 43 Kan. 102, 22 Pac. 1006. The act of March 3, 1875, provides that its provisions shall not apply to lands reserved from sale; but here, in addition to the title held by the United States as original proprietor, specific authority was given to sell the lands as other public lands are sold. Provision was made in the treaty for right of way to railroad companies over the land not ceded, and which remained to the Indians, but no provision was made nor limitations placed upon the power of the United States as to granting a right of way over the lands which had been ceded. Being public lands, it follows that upon compliance with the provisions of the act of March 3, 1875, the company would acquire a right of way. The court found that the company had complied with the requirements of the act, and, if we could measure the sufficiency of the evidence from what is preserved in the record, we would be compelled to hold that there was enough to sustain the finding.

Complaint is made that a copy of the map filed with the secretary of the interior was received in evidence without sufficient identification. It appears to be an exemplification of the original which was
same. filed in the department of the interior by the railway company, certified by the commissioner of the general land office to be a literal copy of the original, and upon its face it appears to cover the land in controversy. Exemplifications of this character are admitted in evidence with like effect as originals, when they are attested by the officers having custody of the originals. Gen. St. 1897, c. 97, § 10. Attached to the original map, and made a part of the same, are the affidavits of the officers of the company, showing that the route surveyed was represented by the map, that it had been indorsed by the board of directors of the company, and that it was filed for and in behalf of the company in order to obtain the right of way under the above-mentioned act of congress. The map shows and the record recites that it was filed and approved in the department of the interior on June 1, 1880.

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Another objection to its reception is that there is no indorsement upon the same showing that it was filed in the land office at Independence, Kan., being the office for the district within which the land in question was situated. The important step in the proceeding was the approval of the secretary of the interior. His approval was a *quasi* judicial act; and when his decision is made and approval given, it may fairly be presumed that the formalities to be observed and preceding steps to be taken by the railway company have been observed and taken. Aside from that, however, there is proof that the map was filed in the land office at Independence. An exemplification of a letter of the register of the land office at that place was introduced in evidence, showing that the maps of location of the railroad were filed in that office on April 27, 1880. It was a letter which accompanied the maps, addressed to the commissioner of the general land office, and was at least competent for the purpose of showing that the map had been filed in the land office at Independence. The letter of the register of the land office at Wichita, to which objection is made, appears to have no bearing on the case, and, being immaterial, no prejudice resulted from its admission. We find no substantial error in the proceedings, and therefore the judgment of the district court will be affirmed. All the justices concurring.

STATE *ex rel.* RAILROAD COMMISSION *et al.*

v.

WILMINGTON & W. R. Co.

(*Supreme Court of North Carolina, March 8, 1898.*)

Appeal from Railroad Commission to Supreme Court—Constitutionality of Act.*—The provision of the act of the general assembly

*As to Railroad Commissioners, see *note*, 8 Am. & Eng. R. Cas., N. S., 613, where the cases relating to railroad commissions and commissioners are collected.

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of North Carolina authorizing an appeal from the railroad commission direct to the supreme court "when no exception is made to the facts as found by the commission" is invalid, the general assembly having no power under the constitution to change the status of the superior court, which was created as the head of the court system below the supreme court, appeal lying from it alone to the supreme court.

APPEAL by petitioners from railroad commissioners.
Dismissed.

Jones & Boykin, for appellants.
R. O. Burton, for appellee.

CLARK, J. The appellee moves to dismiss this appeal because taken direct from the railroad commission to this court, instead of to the superior court. The point was considered and adjudged in the cases of *Rhyne v. Lipscombe*, 29 S. E. 57, *State v. Ray*, *Id.* 61, and *State v. Haywood Co. Com'rs*, *Id.* 60, at this term. It was held in those cases that, the superior court having been created by the constitution, the legislature could not abolish it, either in whole or in part, and that section 12, art. 4, authorizing the general assembly to allot and apportion the jurisdiction of courts below the supreme court, "without conflict with other provisions of the constitution," conferred on the legislature power to give to courts created by it original jurisdiction, exclusive or concurrent with the superior court, of any matters heretofore cognizable in the latter court (though not appellate jurisdiction over justices of the peace), but that this did not carry power to change the status of the superior court, which was created as the head of the court system below this court, and that from it alone appeals lie to this court. The historic and legal meaning of the term "superior court," well understood when the constitution was adopted, is to be regarded in construing the language of the constitution, which again created it and provided for the election and terms of its officers and the residence and rotation of its judges. Consequently, it was held that, while the general assembly could allot and distribute the original jurisdiction hitherto belonging to the superior court, it could

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not deprive that court of its headship of the court system below this court. Section 7 of the act creating the railroad commission (Acts 1891, c. 320) recognizes this by providing for appeals from the commission to the superior court, and that from the judgment of the latter either party might appeal to this court. The provision in section 29 of said act, authorizing an appeal from said commission direct to this court "when no exception is made to the facts as found by the commission," we are constrained to hold invalid for even a stronger reason than that which impelled us to dismiss an appeal from the criminal circuit court in *State v. Ray*, 29 S. E. 61, at this term. The railroad commission is a court of record (Acts 1891, c. 498), and a court "inferior to the supreme court," in the purview of section 12, art. 4, of the constitution, and, of course, with powers inherent in all courts as to punish for contempt, etc. (*Express Co. v. Wilmington & W. R. Co.*, 111 N. C. 463, 16 S. E. 393); but, as was held in *State v. Wilson*, 121 N. C. 425, 28 S. E. 554, it is an administrative court, somewhat like the board of county commissioners. It can issue no execution upon the fines or penalties laid by it, but they must be collected by action in the superior court (*Mayo v. Telegraph Co.*, 112 N. C. 343, 16 S. E. 1006); and in such action the railroad commission occupies the position of relator, and not that of a lower court, from which an appeal has been taken. *Railroad Commissioners v. W. U. Tel. Co.*, 113 N. C. 213, 18 S. E. 389. Its orders and regulations are merely the basis of judicial action in the superior court to enforce them or to punish their violation. Acts 1891, c. 320, §§ 7, 10. If, therefore, this court could entertain appeals direct from an order of the railroad commission, it would be assuming original jurisdiction of a matter as to which, though heard and determined by a board of competent jurisdiction (*Leavell v. Telegraph Co.*, 116 N. C. 211, 21 S. E. 391), there has been no judicial adjudication of its validity nor proceedings to punish its violation, whereas, the jurisdiction of this court is appellate only, except

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in the case of claims against the state (article 4, § 9), in which instance its decisions are merely recommendatory. The appeal must be dismissed. In *Leavell v. Telegraph Co.*, *supra*, this point was not raised. If the railroad commission shall adhere to the ruling made in this case, the appeal will lie in the first instance to the superior court, and thence the party cast has his appeal, if he so elect, to this court. Appeal dismissed.

TOWN OF BRISTOL

v.

NEW ENGLAND R. CO.

(Supreme Court of Errors of Connecticut, Jan. 21, 1898.)

Changing Crossing—Order of Railroad Commissioners—Right of City to Enjoin—Sufficiency of Defense.—In an action by a town to enjoin a railroad, ordered by the railroad commissioners to change its crossing, and, for that purpose, to build over M. street, and adjoining N. M. street, a bridge, with a wing or supporting abutment, from constructing such abutment so as to encroach on N. M. street, plaintiff claimed that the record of such commissioners did not sufficiently indicate the land to be covered by the structure authorized. *Held*, that a record which so describes the land as to enable a competent surveyor to set his stakes is sufficient.

Same—Authority of Commissioners.—The commissioners could authorize defendant to occupy a few feet of N. M. street by constructing such abutment upon it, and were not bound to first adjudicate the legal limits of the street and formally condemn a certain portion of its surface.

Demurrers.—Demurrers must specify the reasons why the pleading demurred to is insufficient.

Authority of Commissioners.*—Under the law of Connecticut the railroad commissioners have power to order any alterations in high-ways, including their partial discontinuance, necessary to the elimination of dangerous railroad crossings, their order being, however, subject to review on appeal to the superior court.

Sufficiency of Order—Demurrer.—The question whether or not such order was made under a misapprehension of essential conditions cannot be raised by demurrer.

*As to Railroad Commissioners, see *note*, 8 Am. & Eng. R. Cas., N. S., 613, where the cases bearing on the subject are collected.

APPEAL by plaintiff from Hartford county superior court. *Affirmed.*

The first count of the complaint is as follows : (1) Main street and North Main street are highways of the town of Bristol, over which said town has all the rights and duties which by law are vested in towns, as to their public highways. (2) Said streets are the two principal business streets of said town. The travel on both said streets, near and at their junction, is very great, on foot, and in trucks, wagons, bicycles, and other vehicles; an electric street railway also passes from one street to the other at that corner, at a grade of about five feet to the hundred. (3) The defendant is planning to build a railway bridge over said Main street, and an embankment on its land northerly of North Main street to support its railway tracks ; and it intends and threatens to, and will, unless it is restrained by this court, build a stone abutment to support said embankment within the limits of said North Main street, and so as to encroach upon said street, and occupy a strip thereof about forty feet long, about four and a half feet in width at the corner, and about six feet in width at the widest point, as shown by a map of said proposed encroachment, hereto annexed. (4) Said encroachment will greatly obstruct and inconvenience the travel on said highway, and, in addition thereto, it will, by cutting off the view of each said street from travellers approaching the corner upon the other street, make said corner very dangerous, because of the likelihood of collision between wagons and other vehicles, tram-way cars, and foot passengers approaching said corner on the two streets. Such danger will be especially great because of the proposed operation of said railway across said bridge over Main street, and nearly parallel to, and very near the line of, North Main street, whereby horses will be liable to be frightened and become uncontrollable at and near said corner, by the sound and sight of passing railway trains. The plaintiff claims an injunction to restrain the defendant from building any abutment or other structure within

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the lines of North Main street, or in any way encroaching thereon." The second is as follows: "Paragraphs 1 and 2 of the first count are made similarly numbered paragraphs of this count. (3) The defendant is planning to build a railway bridge over Main street, and an embankment, wholly or in part on its land on the north side of North Main street, to support its railway tracks; and it intends and threatens to, and will, unless it is restrained by this court, build a stone abutment, or other structure, to support said embankment, within the limits of said North Main street, and so as to encroach upon said street, and occupy a portion thereof of about twenty-one feet long, about eleven feet in width at the corner, and about fourteen feet in width at the widest point. (4) Paragraph 4 of the first count is made paragraph 4 of this count." Defendant's answer contained two defenses. "First Defense. (1) The defendant admits that Main street and North Main street are highways of the town of Bristol, and that the defendant is planning to build a bridge to carry its railway over the highway at the corner of Main and North Main streets, including, as a necessary part of said bridge, a stone wall or abutment to support it. (2) As to the other allegations of the plaintiff's complaint, the defendant has not sufficient knowledge to form a belief, and leaves the plaintiff to its proof thereof. Second Defense. On the 2d day of March, 1891, the railroad commissioners of the state of Connecticut duly made, after full hearing of all parties in interest, including the plaintiff in this action, an order, a copy of which is hereto annexed, as Exhibit 1. A copy of each of the maps described in said order as delineating the alterations and changes ordered is also filed herewith, one to be marked 'Exhibit 2,' and the other to be marked 'Exhibit 3.' The said order of the railroad commissioners was, upon appeal, affirmed by a decree of this court, July 29, 1892. (3) The defendant, at the time when this action was brought, planned and intended, and has ever since planned and intended, to build the embankment and stone abutment re-

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ferred to in the complaint, and alleged to be within the limits of North Main street, in exact accordance with the said order of the railroad commissioners affirmed by this court, and with said maps delineating the changes and alterations ordered."

Exhibit 1 reads as follows: "State of Connecticut, Office of the Railroad Commissioners. Hartford, March 2nd, 1891. Be it remembered that on the 2d day of September, 1890, the following order for hearing and of notice was by us made in regard to the removal of the grade crossing of the New York & New England Railroad, and the highway known as 'Main Street,' in the town of Bristol, viz: 'State of Connecticut, Office of the Railroad Commissioners. Hartford, September 2d, 1890. Whereas, the directors of the New York & New England Railroad Company failed to remove or apply for the removal during the year ending August 1st, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad; and whereas, in our opinion, said directors should have applied for the removal of the grade crossing of their road and the highway known as "Main Street," in the town of Bristol: Therefore, be it ordered that a hearing be had at the passenger station of said company in said Bristol on Wednesday, the 24th day of September, 1890, at 9 o'clock a. m., as to what alterations, changes, or removals, if any, shall be made at said crossing, and by whom done, and that notice thereof be given to the selectmen of said town, to said company, and to the owners of the land adjoining said crossing, and adjoining that portion of said highway to be changed in grade, by George T. Utley, by depositing in the post office in Hartford, postage paid, true and attested copies of this order, on or before the 6th day of September, instant, addressed one to each of the following named parties, viz: The selectmen, Bristol, Conn; James W. Perkins, secretary N. Y. & N. E. R. R. Co., Boston, Mass; Henry W. Gridley, the Bristol National Bank, Samantha Churchill, John B. Churchill, Augusta Churchill, the Society of Trinity Church, the

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Bristol Savings Bank, C. H. Riggs, F. H. Williams, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachael Nott, Charles E. Nott, Julius R. Mitchell, and Drusilla Mitchell, all of Bristol, Conn. Geo. M. Woodruff, W. H. Hayward, Wm. O. Seymour, Railroad Commissioners.' And on the 24th day of September we met at the time and place named in said order, when it appeared, and we do find, that said order of notice had been duly complied with, and that reasonable notice of said hearing had been given to said railroad company, to the municipality in which said crossing is situated, and to the owners of the land adjoining such crossing, and adjoining that part of the highway to be changed in grade; and all of said parties appeared, and were heard in part, and the further hearing was by agreement adjourned until the 25th of November, 1891, at the town hall in said Bristol, where said parties again appeared and were heard. And the further hearing on said matter was from time to time adjourned until the 11th day of February, instant, at this office, at 2 o'clock p. m.; and on the 3d day of February, instant, a further order of notice was by us issued as follows, *viz*: 'State of Connecticut, Office of the Railroad Commissioners. Hartford, February 3d, 1891. Whereas, the undersigned railroad commissioners of Connecticut on the 2d day of September, 1890, issued their order as follows, *viz*: "State of Connecticut, Office of the Railroad Commissioners. Hartford, September 2d, 1890. Whereas, the directors of the New York & New England Railroad Company failed to remove or apply for removal during the year ending August 1st, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad; and, whereas, in our opinion, said directors should have applied for the removal of the grade crossing of their road and the highway known as 'Main Street,' in the town of Bristol: Therefore, it is ordered that a hearing be had at the passenger station of said company in said Bristol on Wednesday, the 24th day of September, 1890, at 9 o'clock a. m., as to

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what alterations, changes, or removals, if any, shall be made at said crossing, and by whom done, and that notice thereof be given to the selectmen of said town, to said company, and to the owners of the land adjoining said crossing, and adjoining that portion of said highway to be changed in grade, by Geo. T. Utley, by depositing in the post office in Hartford, postage paid, true and attested copies of this order, on or before the 6th day of September, instant, addressed one to each of the following named parties, *viz*: The selectmen, Bristol, Conn.; James W. Perkins, secretary N. Y., N. H. & E. R. R. Co., Boston, Mass.; Henry W. Gridley, the Bristol National Bank, Samantha Churchill, John B. Churchill, Augusta Churchill, the Society of Trinity Church, the Bristol Savings Bank, C. H. Riggs, F. H. Williams, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachael Nott, Julius R. Mitchell, and Drusilla Mitchell. Geo. M. Woodruff, W. H. Hayward, Wm. O. Seymour, Railroad Commissioners." And the hearing in said matter having been adjourned from time to time till the 11th day of February, 1891, at 2 o'clock p. m., at our office in Hartford: Therefore, ordered, that notice of said adjourned hearing be given by Geo. T. Utley, by depositing in the post office at Hartford true and attested copies of said original order and of this order, addressed to each of the parties named in said order of September 2d, 1890, on or before the 5th day of February, instant. Geo. M. Woodruff, W. H. Hayward, Wm. O. Seymour, Railroad Commissioners.' And pursuant to said adjournment and notice we met at said last-named time and place, when said parties again appeared, and were fully and finally heard. And now, after such notices and hearings, we, being of opinion that the financial condition of the said New York & New England Railroad Company will warrant such order, and that public safety requires the same, do hereby order such crossing removed, and do determine and order that the following alterations, changes, and removals be made and done, to wit: That the

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method of crossing be altered so that said highway, instead of crossing said tracks at grade, as at present, be carried under said tracks, and, for that purpose, that the location of the said crossing be changed by the removal of said tracks from their present location to a point about eighty feet southerly therefrom; the same being carried over said highway on a double-track iron bridge, with not less than twelve feet clear head room, with stone abutments located upon the street lines upon each side, and with supporting columns upon the latter lines of the street (said street being excavated so much as may be necessary to give said head room), with approaches not exceeding nine feet in a hundred on the north side of said crossing, and level upon the south side, and not exceeding five feet in a hundred on North Main Street, and four feet in a hundred on Prospect street; said alterations and changes being also delineated and shown on two maps on file in this office one marked: 'N. Y. & N. E. R. R. Proposed Undercrossing of Main Street, Bristol, Conn. Scale, 50 feet to one inch. Chief Engineer's Office. Boston, February 10th, 1891. L. B. Bidwell, Chief Engineer.' And the other marked: 'Proposed Change of Main Street Crossing, Bristol, Conn. Scale, 40 feet to one inch. Boston, February 10th, 1891, L. B. Bidwell, Chief Engineer.' All of said alterations, changes, and removals to be made and done by said railroad company, and the expense thereof, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public highways shall sustain by reason of any change in the grade of such highways in consequence of any change, alteration, or removal above ordered, to be paid by said railroad company. Geo. M. Woodruff, W. H. Hayward, Wm. O. Seymour, Railroad Commissioners."

Plaintiff's demurrer to the second defense in the first count is as follows: "(1) All the allegations of said defense, taken together, are insufficient in law to justify the building of an embankment and abutment within the limits of said North Main Street in the manner

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described in the complaint. (2) The order of the railroad commissioners referred to in paragraph 1 of said defense, and affirmed as alleged in paragraph 2 thereof, and the maps and exhibits 2 and 3 referred to in paragraph 1 as delineating the alterations and changes ordered, do not authorize any encroachment on said North Main street by an embankment to support the railway tracks of the defendant, or by a stone abutment to support said embankment. (3) The plan and intention of the defendant to build the embankment and stone abutment referred to in the complaint, and alleged to be within the limits of said North Main Street, in exact accordance with the said order of the railroad commissioners affirmed by this court, and with said maps delineating the changes and alterations ordered as set forth in paragraph 3 of said defense as amended, is not authorized or justified, in so far as said plan or intention of the defendant involves any encroachment on said North Main street by an embankment or abutment. (4) Said order of the railroad commissioners, with the maps therein referred to, do not authorize any encroachment on North Main street for the purpose of locating, building, or maintaining the stone abutments referred to and described in said order." Its demurrer to the second defense in the second counts is as follows: "(1) All the allegations of said defense, taken together, are insufficient in law to justify the building of an embankment and abutment within the limits of said North Main street in the manner described in said second count. (2) The order of the railroad commissioners referred to in paragraph 1 of said defense, and affirmed as alleged in paragraph 2 thereof, and the maps and exhibits 2 and 3 referred to in paragraph 1 as delineating the alterations and changes ordered, do not authorize an encroachment on said North Main street as described in said second count of the complaint, by an embankment to support the railway tracks of the defendant, or by a stone abutment or other structure to support said embankment. (3) The plan and intention of the defendant to build the embankment and stone abutment

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referred to in said second count of the complaint, and alleged to be within the limits of said North Main street, in exact accordance with said order of the railroad commissioners affirmed by this court, and the said maps delineating the changes and alterations ordered as set forth in paragraph 3 in said defense, is not authorized or justified, in so far as said plan or intention of the defendant involves any encroachment on said North Main street by an embankment, abutment, or other structure. (4) Said order of the railroad commissioners, with the maps, therein referred to, do not authorize any encroachment on North Main street for the purpose of locating, building, or maintaining the stone abutment referred to and described in said order."

Frank L. Hungerford and Epaphroditus Peck, for appellant.

Edward D. Robbins, for appellee.

HAMERSLEY, J. The complaint alleges that the defendant intends to build a bridge for carrying its railroad tracks over Main street at the corner of that street and North Main street (they being highways within the limits of the town of Bristol), and threatens to build a stone abutment in connection with said bridge, so as to encroach upon North Main street, and occupy a strip thereof, as shown by the annexed map, marked "Exhibit A," and claims an injunction restraining the defendant from building any structure within the limits of North Main street. Exhibit A is a map (drawn to a scale) purporting to be a *fac simile* of the defendant's plan and profiles for the abolition of the Main street grade crossing at Bristol, prepared and signed by its chief engineer. The right of the plaintiff to ask an injunction arises from the duties imposed upon it by law, as the agent of the state in the maintenance and care of these highways; and the defendant, in its second defense, sets up the paramount authority of the state, exercised through an order of the railroad commissioners, appropriating this portion of the highway as necessary for the abolition

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of a public nuisance endangering the lives of its citizens who use the highways. The answer contains a first defense, in which each allegation of the complaint is either denied or admitted, and a second defense, which purports to allege extrinsic facts sufficient, if proved, to defeat the plaintiff's action, admitting for the purposes of the defense the facts stated in the complaint. The allegations of the defense are: (1) The existence of an order by the railroad commissioners directing the defendant to remove its present grade crossing of Main street, and for that purpose changing the location of said crossing to a point 80 feet southerly, at the corner of Main and North Main streets, and directing the defendant to there build over Main street, and adjoining North Main street, a bridge, with a wing or supporting abutment, whose location is definitely fixed by the maps which are a part of the order. (2) The structure which the defendant threatens to build, as alleged in the complaint, and shown on the maps contained in the complaint, is in exact accordance with the command of the commissioners contained in the order, and the maps, which are a part thereof. If these allegations of fact are denied and proved, a complete defense to the action is established. Instead of replying, by denial or otherwise, to the defense, the plaintiff has demurred; and the action of the court in overruling that demurrer is the only error assigned in this appeal.

Before dealing directly with the demurrer, we consider what seems to be the plaintiff's conception of the fundamental defect claimed to be apparent in the second defense. It is this: An inspection of the record of the proceedings of the commissioners does not clearly indicate what portion, if any, of the land within the true limits of the highway, is to be covered by the structure authorized. This claim is true, but it must be distinguished from a claim confounded with it,—that the record does not precisely indicate that portion of the surface of the land which the structure authorized is to occupy. The latter claim is not

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true. A map (drawn to a scale) locating the structure in accordance with distances from permanent and known monuments describes its actual location as precisely as is possible. Such is the character of the map in question. It purports to denote corners of permanent buildings, and the center line of the appellee's present location, fixed by public authority, and made a matter of public record. It is unnecessary that a map of a projected structure, of the nature of that which was the subject of the order of the railroad commissioners, should be so drawn as to describe every possible monument in the vicinity of its site. It is enough if it describes such, and so many, that, when received upon the ground, and in relation to the ground, a competent surveyor can ascertain the points at which to set his stakes. The presumption is that the board of railroad commissioners, one of whose members the law requires to be a civil engineer, has made no order for the construction of a public work which cannot be precisely executed. On demurrer, the answer which set forth such an order was entitled to the support of that presumption. The exact position of the land to be occupied being thus sufficiently shown, any statement in the order of the precise point where the actual line of North Main street crosses this land is immaterial to the sufficiency of the defense. The commissioners are dealing with the abatement of a nuisance. Their authority to order such construction of a bridge as is necessary to most thoroughly abate that nuisance is complete, including the power to occupy land covered by a highway. They have no authority to determine the disputed lines of a highway, and were not bound to do so in making the order. The defense set up is complete, whether the land the defendant is ordered to occupy is covered to the extent of 1 foot or of 20 feet by the easement of a highway. If the plaintiff, as guardian of that highway, thought its limits were unnecessarily encroached upon, it was its duty to appeal from the order. The legal exercise of discretion by the commissioners cannot be challenged in any other way.

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But in this connection the plaintiff claims that the record does not clearly show that the commissioners intended that any portion of the highway should be occupied. We think the record does clearly show that the commissioners made this loca-
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tion with full understanding that the land occupied might be, and probably was, within the limits of this highway. Assuming that there must be an intention to appropriate the portion of the highway within the limits of the land designated, we think that intention sufficiently appears on the face of the record, which includes the order expressed in writing and in maps. The commissioners apparently decided that the structure described, covering the land defined, is necessary to the abatement of the nuisance, notwithstanding a portion of the land defined may be covered by the adjoining highway, and ordered the defendant to build that structure. This they had the power to do, and were not bound to first adjudicate the legal limits of that highway, and then, in addition to the limitation of the use of the highway necessarily involved in the location of the structure ordered, to formally condemn or discontinue as a highway a precise number of square feet. The decision made, and the structure ordered, were a sufficient appropriation for that purpose of such portion of the highway as actually covered land designated. It follows that when the defendant alleges the existence of this order, and that the structure it threatens to build as alleged in the complaint is in exact accordance with the order, it sets up a complete and valid defense, consistent with the truth of the essential allegations of the complaint; it alleges facts, and not conclusions of law; it assumes the whole burden of proof properly belonging to it (*i. e.* the burden of proving the existence of the order, and of proving the identity of the structure it has threatened to build, as alleged in the complaint, with the structure it has been ordered to build); and it does not, as claimed by the plaintiff, allege facts that in any event can be held equivalent to a general denial, for it admits the

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allegation material to the plaintiff's case, that the threatened structure is within the limits of the highway. And if the defendant fails to establish by proof the existence of the order, and the identity of the structures, the admission of this fact entitles the plaintiff to judgment. If, on the other hand, the defendant does prove the facts it has alleged, then the fact admitted, material to the plaintiff's case, becomes immaterial to the case the defendant has established, and whether the fact so admitted is in reality a fact or not cannot affect the defendant's right to a judgment. "All demurrers must distinctly specify the reasons why the pleading demurred to is insufficient." Gen. St. § 873. Reasons for claiming the insufficiency of the second defense, not specified in the demurrer, do not demand discussion. The plaintiff is not entitled to a reversal of the judgment because the trial court did not sustain the demurrer for reasons not specified. The first reason stated in the demurrer is too general to have any force. It is claimed under the fourth reason that the clause in the written portion of the order directing the building of a bridge over Main street, "with not less than twelve feet clear head room, with stone abutments located upon the street lines upon each side, and with supporting columns upon the gutter lines of the street," controls the subsequent clause, directing changes in North Main street, and contradicts and renders invalid that portion of the order contained in the maps which directs in detail the changes to be made in North Main street, and fixes the exact location upon the surface of the land of the supporting wall or abutment to be there built. We do not so read the order. The description of the bridge over Main street as one with abutments on the street lines, and supporting columns on the gutter lines, of that street, exhausts its force in describing the abutments and supporting columns mentioned, and that description cannot be construed as applicable to the portions of the order dealing with changes in other streets, nor as compelling a wing or

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supporting abutment on North Main street to be located upon the street line, notwithstanding the portion of the order directing these changes locates with certainty the abutment in a different place. Giving the widest allowable scope to the language of the two other reasons, they present, in addition to the points already considered, only this claim: That the railroad commissioners had no power, in their order for the elimination of the grade crossing at Main street, to direct the abutment in question to be built within the lines of North Main street; and, if they had such power, they have not given such directions. If the commissioners had the power to order the erection of the abutment as described, covering a portion of the highway, it is immaterial to the sufficiency of the second defense for reasons already stated, whether or not the abutment ordered actually extends within the legal lines of North Main street. That they had the power, under chapter 220 of the Public Acts of 1889, to order any changes or alterations in highways, including their partial discontinuance, necessary to the elimination of a dangerous grade crossing (of which necessity the commissioners are the judges), subject to a review of their proceedings on appeal to the superior court, and that the law conferring this power is constitutional, is too well settled to be now questioned. *Town of Suffield v. New Haven & N. R. Co.*, 53 Conn. 368, 370, 5 Atl. 366; *Fairfield's Appeal*, 57 Conn. 167, 171, 17 Atl. 764; *State v. Branford*, 59 Conn. 402, 407, 22 Atl. 336; *Cullen v. Railroad Co.*, 66 Conn. 211, 222, 33 Atl. 910; *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527, 26 Atl. 122. An appeal was taken from the order in question to the superior court, and the order was affirmed by that court, and the judgment of the superior court was affirmed by this court, in the case last cited. To all these proceedings the plaintiff was a party. So far as concerns this plaintiff, the question of public safety, and that of necessity of occupying any portion of North Main street for the elimination of the

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grade crossing as ordered, is *res judicata*. State v. Branford, 59 Conn. 411, 22 Atl. 336. The plaintiff suggests in argument that the course of proceedings by the commissioners, as recited in the order, lays no valid foundation for an order directing changes in North Main street. The record of the commissioners' proceedings, on its face, seems sufficient to justify any necessary change in that highway; and being sufficient on its face, the question of some possible latent defect cannot be raised by this demurrer, even if the plaintiff could raise it in any way other than by appeal.

The brief and argument of the plaintiff suggest that its real grievance is based on the assumption that the second defense in some way cuts off or abridges its right to establish upon trial the claim that, whatever this order may apparently say, the commissioners did not in fact intend to authorize the occupation of any part of North Main street, and therefore did not authorize an abutment extending over the line of that street. We fail to see how this right, if the plaintiff has such a right, is in any way affected by the mode of pleading the second defense, or how the demurrer can be construed as specifying such a reason for the insufficiency of the pleading. If the plaintiff can in this action, or in any other action, attack the validity of the order, or establish a meaning not apparent on its face, because the order was made under a misapprehension of essential conditions, it certainly cannot do so by means of this demurrer. We think the question raised by the demurrers to the first and second counts do not materially differ. No claim was made in argument that the same considerations did not apply to both demurrers.

There may be doubt whether the true theory of the practice act would not, in a case like this, require the defendant to allege the facts set up in the second defense in connection with those set up in the first as a single defense, rather than to make such facts the basis of a separate and distinct defense. The practi-

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cal results of following either form may be substantially the same, and any error in such a matter is waived, if not specified in a demurrer. As the question is not material to our decision, we merely mention the doubt, in order to avoid any implied approval of the form followed. There is no error in the judgment of the superior court. The other judges concurred.

PITTSBURG, C., C. & ST. L. RY. CO. *et al.*

v.

CITY OF INDIANAPOLIS.

(*Supreme Court of Indiana, March 30, 1897.*)

Annexation of Railroad Lands by City—Right of Appeal—Residence of Corporation.*—A railroad company owning land near a city, upon which is located its repair shops, is not a "resident freeholder" within the meaning of the statute of Indiana, providing that one or more such freeholders may appeal from the annexation of their property by the city.

Same.—And the statute limits the right of appeal from such annexation to residents of the territory annexed.

APPEAL from Marion county superior court. *Affirmed.*

Samuel O. Peckens, for appellants.

J. B. Curtis, for appellee.

HOWARD, J. Under provisions of sections 37 and 88 of the act approved March 6, 1891, known as the "City Charter" (1 Rev. St. 1891, p. 137; 2 Rev. St. 1894, §§ 3808, 3809), the city of Indianapolis proceeded to annex certain territory, a part of which consisted of unplatted lands owned by the appellant railroad companies. Appellants appealed from such annexation to the court below, claiming the right to take such appeal by reason of the provision in section 38 of said act that "an appeal may be taken

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*See note at end of case.

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from such annexation, by one or more resident freeholders, in the territory sought to be annexed, filing their remonstrance in writing against such annexation," etc. Appellee moved to dismiss the appeal for the reason that the appellants were not "resident freeholders in the territory sought to be annexed," filing the affidavit of Mayor Denney in support of such motion. In answer to the motion and affidavit of appellee, the appellants, by the solicitor of the first-named appellant, filed a counter affidavit, giving reasons to show that appellants were resident freeholders in the territory, as follows: "That one of the offices of said plaintiff, and an office of one of the superintendents of the said P., C., C. & St. L. Railway Company, is, and was at the time of the filing of said complaint, located in the city of Indianapolis, Indiana, where the business of the Indianapolis division of said company is transacted, a part of the railroad and property of said division being situated in and upon the territory described in the complaint; that in said territory is the office of the master mechanic of the said railway company, and the business of the shops for the construction and repair of cars, engines, and machinery of said company for said division is situated in said territory: that the said C. H. & I. Railroad Company (the remaining appellant) is a corporation under the laws of the state of Indiana, and has an office and place of business in the said city of Indianapolis." According to the showing thus made in the affidavit, if each of the appellants was an individual, instead of a corporation, such individual would have no right of appeal under the statute. The substance of the affidavit is that the appellants each have an office and place of business in the city of Indianapolis (that is, outside the territory to be annexed), while in addition to this, they have railroad property in the territory in question, and the first-named appellant has a master mechanic's office there, together with the business of its construction and repair shops. If any residence is shown by the facts stated, it is a

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residence in the city of Indianapolis, with only property and business in the territory to be annexed. In *Kirkland v. Board*, 142 Ind. 123, 41 N. E. 374, we held that the phrase "resident freeholders upon such street," as used in section 73 of the city charter, was not equivalent to residents of the city of Indianapolis owning property upon such street, but was intended to mean persons residing upon the street and owning property thereon. And in the recent case of *Taggart v. Claypool* (Ind. Sup.) 44 N. E. 18, in considering the same sections of the city charter now again before the court in the case at bar, it was held competent for the legislature to confine the right of appeal in annexation proceedings to "resident freeholders in the territory sought to be annexed." Unless, therefore, it should appear that railroad corporations have some privileges, under this statute, in addition to those given to individual citizens, it must follow that in the case now before the court there was no right of appeal in the appellant companies. The authorities to which counsel refers have relation, for the chief part, to the domicile of corporations. In general, the domicile of a corporation is in the state from which it receives its charter, though a railroad company having its road in two or more states, but being one corporation, with one management and board of directors, may be said to be a separate corporation in each of said states, and governed as to its property in each state by the laws thereof. For most purposes the company may be sued in any county in the state through which its road runs, by service of process upon the proper officer or agent therein. *Aspinwall v. Railway Co.*, 20 Ind. 492; *Railway Co. v. Harden*, 137 Ind. 486, 37 N. E. 324; *Eel River R. Co. v. State*, 143 Ind. 231, 42 N. E. 617. In 1 Wood, R. R. (Minor's Ed., 1894) 30, it is said: "A corporation, like an individual, may have a domicile in one state and residence in another. Its domicile, as we have seen, is in the state creating it, but its residence is in the place where its principal office is located, and its principal operations are conducted." And in the same work (page

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31), quoting from an English case, it is said: "The home of a corporation must be taken to be that place which is occupied as such,—where their profits come home to them, where orders emanate, and where the chief offices of the company are to be found." And again, on the page last cited: "In most states, as to railroad corporations, it is held that they are, for many purposes, to be regarded as constructively residents of each county, city, or town through which the road passes. But for ordinary purposes they are treated as having their residence only in the place where their principal office is located and their principal business is transacted." In Rap. & L. Law Dict. 1113, it is said: "'Residence' is used in law to denote the fact that a person dwells in a given place, or, in the case of a corporation, that its management is carried on there."

Following these authorities, we should conclude that, at most, the record shows that appellant's residence was in the city of Indianapolis, where the business of said companies was transacted, and not in the territory to be annexed. We do not think, however, that the domicile or residence of the companies, as such, is in question in the case at bar. It is to be remembered that the legislature might have provided for annexation of territory to the city without giving any right of appeal. We are of opinion that it was the intention of

same.

that body, in this provision of the city charter, to confine the right of appeal from annexation to those persons who should be citizens and freeholders of the territory to be annexed. Such persons, as said in *Kirkland v. Board and Taggart v. Claypool*, *supra*, have special interests in the matter, whereas the rights of mere property owners are not materially affected. In the case last cited the court said: "It is the convenience, safety, and well-being of the inhabitants of the territory to be affected, on the one hand, and that of the city, on the other, that the statute makes the criterion for determining the question of annexation." As to any difference in local taxation it was also said in that case that, while annexation makes

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the property owner liable to city taxation for local purposes, "he is freed from local taxation in the township or other political subdivision wherein he was taxed before annexation." Besides, as may be inferred, "the benefits to be derived from the expenditure of public money raised by taxation in the city would be correspondingly increased." We find no error in the record. Judgment affirmed.

NOTE.

Railroad Corporations—Residence.—The residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised. It is present where it is engaged in the prosecution of the corporate enterprise. *Bristol v. Chicago, etc., R. Co.*, 15 Ill. 436; *Baldwin v. Miss., etc., R. Co.*, 5 Clark (Iowa), 518; *Louisville R. Co. v. Letson*, 2 How. (U. S.) 497; *Conover v. Ins. Co.*, 10 How. Pr. 403; *Hubbard v. Ins. Co.*, 11 How. Pr. 149; *Glaize v. S. Car. R. Co.*, 1 Strob. 79; *Cromwell v. Ins. Co.*, 2 Rich. 512; *Bank v. McKenzie*, 2 Brock. C. C. 392; *Adams v. Great Central R. Co.*, 6 Hurl. & N. 404; *Smith v. Silver Valley Mining Co.*, 10 Am. & Eng. R. Cas. 1; *Balt. & Ohio R. Co. v. Glenn*, 28 Md. 287; *Gill v. Kentucky & Col. Co.*, 7 Bush (Ky.), 635; *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. (Va.) 445; *Day v. Newark India Rubber Co.*, 1 Blatch. C. C. 628; *Land Grant Co. v. Board of Commissioners*, 6 Kan. 245; *N. O., J. & G. N. R. Co. v. Wallace*, 50 Miss. 244; *Ormsby v. Mining Co.*, 56 N. Y. 623.

GRAND TRUNK RY. CO.

v.

CENTRAL VERMONT R. CO. (AMERICAN LOAN & TRUST Co. Intervener).

(*Circuit Court, D. Vermont, Feb. 12, 1898.*)

Receivers—Lien on Earnings—Demurrer by Interveners.—Only the defendant railroad company can object to a bill for the appointment of a receiver to take charge of its affairs upon the ground that plaintiff is not a judgment creditor, and is not entitled to follow the assets in equity; and such question cannot be raised by an intervening creditor.

Same.—A lien upon the gross earnings of a railroad company cannot be enforced with adequacy at law.

Charles M. Wildes, for plaintiff.

Moorfield Storey, for demurrant.

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WHEELER, District Judge. The bill alleges liabilities of the defendant to the plaintiff, some secured by pledge of gross earnings, some by mortgage bonds, some by traffic balances, and some not at all;

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also, other liabilities of the defendant, secured by mortgages and otherwise; and the situation of the defendant's road and property, with reference to its duties as a common carrier, its insolvency, and liability to multiplicity of suits, embarrassment, disintegration, and loss to its security holders, if permitted to go on; and praying the appointment of a receiver, the marshaling of assets, and for further relief. On appearance and consent, yielded by the defendant, receivers were appointed and took possession; and the American Loan & Trust Company, one of the mortgagees mentioned in the bill, afterwards, by leave of court, intervened as a defendant, and filed a demurrer to the bill for want of equity, which has now been heard.

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rer by Intervenor.

The principal objection urged to the bill is that the plaintiff is not a judgment creditor, and is without right to follow the assets of the defendant in equity in this court, where the division between remedies at law and in equity is strict. If this would have been true at the outset, it would only have been so as to the defendant then in court, which only had the right to insist upon a trial at law of its liabilities to the plaintiff, and might waive it, and did. The demurrant came into the cause as it

Same.

stood with that right waived. Nothing is claimed of it, or by it, that is triable by jury. The lien upon gross earnings set up could not be enforced with adequacy at law, and the situation set forth is like that which is said by MR. CHIEF JUSTICE FULLER, for the court, in *Railroad Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787, to be sufficient for a bill by the insolvent corporation for a receiver, and the marshaling of assets. If the corporation, as plaintiff, could maintain such a bill against its creditors, for distribution of its assets among them, no good reason is now here apparent why a substantial creditor could

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not maintain a like bill, in behalf of itself and other creditors, against the corporation, for the same purpose; and more clearly, if it could maintain such a bill, it could consent to the same relief upon a bill against it. Its position as plaintiff or defendant would not, in equity procedure, be material. The demurrant, as an intervener, does not seem to stand in a position of embarrassment by this form of procedure, or of having any just cause to object to it. Demurrer overruled.

NORTHERN ALABAMA RY. CO.

v.

HOPKINS.

(*Circuit Court of Appeals, Fifth Circuit, May 3, 1898*)

Receivers—Allowance of Expenses—Estoppel.*—Where a railroad receiver had incurred expenses in taking trips to Europe at the instance of the bondholders, for the purpose of extricating the road from its financial difficulties, the bondholders are estopped to complain that the receiver was allowed such expenses out of the proceeds of the sale of the road under a decree of foreclosure.

Same.—And the purchasers of the road at such sale were not entitled to object to such allowance.

Same.—Other expenses incurred by the receiver in travelling to and from his residence to the railroad property and elsewhere about the country in the interest of the property in his custody were properly allowed under such decree.

Same—Appeal.—The appellate court will not disturb the findings of the lower court in the matter of the compensation of a receiver, unless injustice clearly appears.

APPEAL from decree modifying master's report from the Circuit Court of the United States for the Northern District of Alabama. *Affirmed.*

Geo. L. Rives and *Girault Farrer*, for Northern Alabama Ry. Co.

J. F. Martin and *E. B. Kruttschnitt*, for E. A. Hopkins.

*See notes at end of case.

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Before PARDEE and McCORMICK, Circuit Judges,
and SWAYNE, District Judge.

PARDEE, Circuit Judge. The Birmingham, Sheffield & Tennessee River Railroad Company, a corporation organized under the laws of Alabama,
Case Stated. owned and operated a railroad from the town of Sheffield, Ala., to the town of Parish, on the line of the Georgia Pacific Railroad, running through some five counties in the state of Alabama. April 1, 1889, the said company executed to the Knickerbocker Trust Company, a New York corporation, a deed of trust under which \$2,975,000 of bonds were issued to the Sheffield & Birmingham Construction Company, which bonds were by the last-named company afterwards hypothecated to various parties. On June 1, 1893, the railroad company having been in default in the payment of interest on the aforesaid bonds for more than a year, the Knickerbocker Trust Company filed its bill in the court *a qua*, asking for the appointment of a receiver, the foreclosure of the trust deed, and a sale of the mortgaged premises. The railway company answered the bill, admitting all its allegations; whereupon, on June 7, 1893, the court appointed E. A. Hopkins, a citizen of Philadelphia, receiver of all the property of the Birmingham, Sheffield & Tennessee River Railroad Company. The evidence shows that Mr. Hopkins was selected as receiver by and through the consent of the parties in interest. The receiver, having filed his bond, on June 16, 1893, took possession of the railroad, and thereafter held and operated the same, under the direction of the court, until November 30, 1895, when he turned over the property to the purchasers thereof. A decree of foreclosure and sale was entered in favor of the Knickerbocker Trust Company on July 5, 1895, by the terms of which it was ordered that the railroad should be sold by a commissioner therein appointed; that the purchasers should pay to the commissioner the sum of \$50,000 in cash; that the purchasers should be entitled, in the settlement of the balance of the purchase price,

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to turn in or use receiver's certificates, or other valid claims against the receiver, or bonds of the railway company; that the receiver should not receive any bid for a sum less than \$500,000; that the proceeds of the sale were to be applied to the payment of the expenses of the sale and the debts and liabilities incurred by the receiver in the operation of the railway property, including a reasonable allowance to the said receiver for his compensation and for his attorney, the clerk's fees, the charges of the trustee and its counsel, all such sums as might by subsequent orders in the cause be declared to be payable out of the purchase money and be prior in lien to the bonds secured by the mortgage and deed of trust, the bonds, coupons, and interest thereon secured by the first mortgage in full, or, if there be not sufficient, a *pro rata* amount thereon, and to the payment of the balance, if any, into court. The railroad was sold under said decree on September 16, 1895, to J. Kennedy Tod and James J. Leiper, who duly complied with the terms of the sale. On October 29, 1895, the sale to Tod and Leiper was confirmed, and a deed ordered, and in the decree to that effect the following provision is found:

"And that the said purchasers, J. Kennedy Tod and James J. Leiper, and their heirs and assigns, be, and they are hereby, allowed to appear, either in person or by attorney, before the said special master, and also before the court, in any and all proceedings wherein and whereby any claim against said Birmingham, Sheffield and Tennessee River Railroad Company, or the receiver of said company, is sought to be declared to be payable out of the said purchase money, or to be prior in lien to the mortgage bonds of said railroad company; and the said purchasers, and their heirs and assigns, shall have the right to appeal from all decrees in such cases to the same extent as the original parties to the said suit."

On January 9, 1896, the receiver presented his final report, accompanied by a statement of his personal expenses, and a petition asking for compensation, and

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the appointment of a master to determine the amount thereof. Upon this petition, a decree of reference was entered the same day containing the following provision:

"It is further ordered and decreed that the said master shall be empowered to hear the testimony of such witnesses as the petitioner and said parties may cause to be brought before him, and such other testimony as may be legally admissible in such cases, and from such testimony to find, fix, and determine the amount of the said receiver Edmund A. Hopkins' compensation, and that he report the amount of his findings to this court by the 27th day of April, 1896."

After taking much evidence, the master filed an elaborate report, recommending that the receiver be allowed for compensation as receiver the sum of \$20,000; for personal expenses,—trips to Europe \$3,150, and for other personal expenses \$3,022.50,—making a total of \$26,172.50, subject to a credit of \$6,127.82. To this report exceptions were filed by J. Kennedy Tod and John G. Leiper and the Northern Alabama Railway Company, as purchasers of the railway property at the foreclosure sale. The grounds of the exceptions were that personal expenses should not have been allowed at all, because no itemized accounts were presented, nor vouchers produced, nor were said expenditures necessary; and that the compensation of \$20,000 is excessive, and not warranted by the testimony. Hopkins, the receiver, also filed exceptions to the report, claiming that the sum allowed him as compensation was inadequate and not reasonable. The exceptions to the master's report were heard before the court, all parties being represented by counsel; whereupon the court, being of opinion that the \$20,000 allowed the receiver for compensation was excessive, and that the sum of \$5,000 per year would be a just and reasonable compensation, maintained the exceptions filed by the purchasers to that extent, but otherwise overruled all exceptions, and entered a decree accordingly. From this last decree the Northern Alabama Railway Company, as purchaser, appealed, assigning

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as error the allowance by the special master and the court of the personal expenses claimed by the receiver. Only the Northern Alabama Railway Company and E. A. Hopkins were made parties. Hopkins entered a cross appeal against the Northern Alabama Railway Company solely, assigning as error that the court erred in overruling the receiver's exceptions, and reducing the amount of compensation as allowed by the special master.

The evidence shows that the master reports that the expenses of the receiver in his several trips to Europe were incurred while the receiver was visiting Europe in the interest and at the instigation of the bondholders, and with the consent of the stockholders of the railway company, to try and bring about a reorganization which would get the property out of its then embarrassed financial condition, and complete the railroad in accordance with its original design; and that it was then believed by all the parties that the receiver, because of his knowledge of the subject, would be the best person who could be selected to present the plans to those who were already interested in the property as well as to those from whom it was hoped additional capital could be obtained.

Without seriously denying this evidence, the appellant contends that the business was entirely outside of the receiver's duties under the order of the court, which, it is claimed, were limited to managing and operating the railroad, keeping it open as a public highway, and to collecting money due to the company; and that, as the endeavors to successfully reorganize the property were fruitless, the expense cannot be allowed, particularly as against Tod and Leiper and the Northern Alabama Railway Company, purchasers of the property. On the other hand, it is contended that Leiper and Tod were really a purchasing committee, representing all the bondholders, and that, as the expenses were incurred in the interest of and with the consent of the bondholders, they cannot be allowed to object to the expense; and it is further contended that

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it was proper for the receiver to act in conjunction with, and in the interest of, all the bondholders, to endeavor to bring about a reorganization of the property. As to these expenses the special master reports as follows:

“It further appears from the testimony given and the papers filed in this matter that, while this suit was in progress, several plans were set on foot, or attempted to be set on foot, between Messrs. J. Kennedy Tod and John G. Leiper, representing the bondholders, and the receiver, and with the consent of the stockholders of the railroad, to get the property out of its then condition, and complete it, in accordance with its original design, into Birmingham, and extending it to Riverton; and that it was then believed that, because of his knowledge of the subject, the receiver in this cause would be the best person who could be selected to present the plans to those who were already interested in the property, as well as to those from whom it was hoped the necessary additional capital could be obtained; and that, pursuant to that understanding, Mr. Hopkins made three trips to Europe, as testified to by him, and which were fully known by Messrs. Tod and Leiper. It cannot be believed that it was understood by those parties that Hopkins was making these trips, or ‘excursions,’ as counsel for the railway company term them, with the intention or expectation of paying his own expenses. He had no interest in the property, either as bondholder or stockholder, and, although he admits an interest in the property by reason of the stock in the railroad company belonging to his friends, it could hardly be supposed that his friendship would be carried to the extent of his paying out \$3,150, when the property involved was first called upon to pay off the claim of the bondholders, amounting to about \$1, 700,000, together with all prior claims and the costs of this litigation, before anything could possibly be realized upon the stock in the railroad. It might be argued that there may have been some other plan understood between Mr. Hopkins and these represen-

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tatives of the bondholders looking to his compensation in this regard, and a repayment of his expenses, but if such a plan existed it might well be presumed they would have made it known on the hearing. Nor can I find, after careful perusal of the plans of reorganization filed as part of the testimony in this cause, any provision by which any compensation for payment of expenses is made to Hopkins. Of course, the distinction must be kept in mind that, even if it had been agreed between the parties to the litigation that provision should be made by the court to pay the receiver's expenses of this character, and that, without notice of such a claim, third persons should have bought the property under the decree rendered in this suit, it might be doubted if the court would impose these expenses as a prior claim under its decree; but in this case the purchasers of the property were the same parties with whom all prior transactions had been had, and they had acted with the receiver in his efforts to put the property on its feet, and they would have been the beneficiaries had his and their efforts been successful. It seems that it would be just and equitable that the amount shown to have been expended on these trips, about which there was no contention, should be allowed. It is shown that the Northern Alabama Railroad Company simply stands in the 'shoes' of Messrs. J. Kennedy Tod and John G. Leiper, the purchasers of the railway property, who themselves represented the bondholders of the Birmingham, Sheffield & Tennessee River Railway Company, and that they assigned their bid to said Northern Alabama Railway Company, which is a new corporation, organized for the purpose of operating the purchased property."

The view we take is that, under the circumstances reported by the special master, the bondholders are estopped to deny the propriety of the expenses incurred by the receiver at their own instance and for their own benefit, and that the purchasers of the railway property under the decree of foreclosure and sale, as such, have

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ance of Expenses
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no interest to contest the expenses of the receiver. The other expenses of the receiver which are contested appear to have been incurred by the receiver in traveling to and from his residence to the railway property and elsewhere about the country, in the interest of the railway property in his custody. As the evidence shows that such traveling was necessary in looking after the involved interests of the railway property in his charge, we are of opinion that they were properly allowed, and we take this view the more readily because, generally, in such cases, the expenses allowed receivers of railway property are so identified with the matter of compensation as to ordinarily affect, if not control, the allowance made by the court. The receiver's compensation, as fixed by the circuit court appears to be reasonable, under the evidence. Certainly, it cannot be held excessive on appeal, for we cannot say that it was unjust, insufficient, or unreasonable.

We had occasion to declare the rule in matters of this kind in *Gaines' Adm'r v. Mills' Ex'rs*, 13 U. S. App. 229, 235, 4 C. C. A. 521, 525, and 54 Fed. 614, 617 :

"Appellate courts are generally not disposed to disturb the findings of the lower courts in the matter of compensation for services of trustees, solicitors, receivers, and masters rendered in the conduct of litigation in said courts, whether based on findings of masters or verdicts of juries, unless injustice clearly appears, for the reason that the court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have. See *Trustees v. Greenough*, 105 U. S. 527, 537; *Cowdrey v. Railroad Co.*, 1 Woods, 331, 341, Fed. Cas. No. 3,293; and *Head v. Hargrave*, 105 U. S. 45."

We have been furnished with no authority to justify us in departing from the rule above declared. We do not find it necessary to pass upon the question, much argued in the briefs, whether it is proper to permit a receiver of the court to participate in schemes of reor-

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ganization. Nor do we decide that the appellant has on the record an interest sufficient to warrant his appeal (but see *Central Trust Co. v. Grant Locomotive Works*, 138 U. S. 207, 222. 10 Sup. Ct. 736), nor that either the appeal or cross appeal was properly taken. The decree of the circuit court is affirmed.

NOTES.

Receivers—Compensation of—Regulated by Statute.—In some jurisdictions the rate of compensation allowed to receivers is fixed by statute.

New York.—2 N. Y. R. S. 470. § 76; N. Y. Laws of 1842, ch. 3, § 2, as amended by N. Y. Laws of 1879, ch. 442; N. Y. Laws of 1883, ch. 378, § 2, as amended by N. Y. Laws of 1886, ch. 275, § 2; N. Y. Laws of 1886, ch. 310, § 6; Code of Civ. Proc., § 3320, as amended by N. Y. Laws of 1892, ch. 465. And compare the following cases: *In re Bank of Niagara*, 6 Paige (N. Y.) 213; *Van Buren v. Chenango Co. Mut. Ins. Co.*, 12 Barb. (N. Y.) 671, cited in *In re Hulbert*, 10 Abb. N. Cas. (N. Y.) 289; *Gardiner v. Tyler*, 2 Abb. App. Dec. (N. Y.) 247; 4 Abb. Pr. N. S. (N. Y.) 263; *Hynes v. McDermott*, 14 Daly (N. Y.) 104; *In re Security L. Ins., etc., Co.*, 31 Hun (N. Y.) 36; *In re Commonwealth F. Ins. Co.*, 32 Hun (N. Y.) 78; *People v. Mutual Ben. Associates*, 39 Hun (N. Y.) 49; *Hanover Ins. Co. v. Germania Ins. Co.*, 46 Hun (N. Y.) 308; *Clapp v. Clapp*, 49 Hun (N. Y.) 195; *In re Woven Tape Skirt Co.*, 85 N. Y. 506; *Attorney Gen'l v. North America L. Ins. Co.*, 89 N. Y. 94, 26 Hun (N. Y.) 294; *Attorney Gen'l v. Guardian L. Ins. Co.*, 93 N. Y. 631; *People v. McCall*, 94 N. Y. 587; *aff'g* 65 How. Pr. (N. Y.) 442; *U. S. Trust Co. v. New York, etc., R. Co.*, 101 N. Y. 478, 25 Am. & Eng. R. Cas. 601.

South Carolina.—*Price v. White*, 1 Bailey Eq. (S. Car.) 240; *Massey v. Massey*, 1 Cheves Eq. (S. Car.) 159.

Tennessee.—*Stretch v. Gowdey*, 3 Tenn. Ch. 565. But see *Woodward v. Williams*, 11 Hump. (Tenn.) 325.

The statutes usually allow a certain percentage for receiving and disbursing the trust fund, and it has been held that one-half the commission is for receiving and the other half for disbursing the same. High on Receivers (3d Ed.) § 785; Beach on Receivers, § 766; *Howes v. Davis*, 4 Abb. Pr. (N. Y.) 71. Compare *In re Bank of Niagara*, 6 Paige (N. Y.) 213; *In re Kellogg*, 7 Paige (N. Y.) 268; *Hosack v. Rogers*, 9 Paige (N. Y.) 468; *In re Roberts*, 3 Johns. Ch. (N. Y.) 43; *Betts v. Betts*, 4 Abb. N. Cas. (N. Y.) 442; *Morgan's Estate*, 15 Abb. N. Cas. (N. Y.) 201; 1 How. Pr. (N. Y.) 184; *Rowland v. Morgan*, 3 Dem. (N. Y.) 292; *Ward v. Ford*, 4 Redf. (N. Y.) 34; *In re Roosevelt*, 5 Redf. (N. Y.) 623.

Same—Not Regulated by Statute.—In the absence of statute, the compensation of receivers is determined by the courts in various ways. The power of the court to fix the receiver's compensation arises from the relation of the receiver to the court appointing him, he being its officer, under its control and direction, and deriving his

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authority to act from that source alone. *Day v. Croft*, 2 Beav. 488; *Magee v. Cowperthwaite*, 10 Ala. 966; *Gardiner v. Tyler*, 3 Keyes (N. Y.) 505; 2 Abb. App. Dec. 247; *Baldwin v. Eazler*, 34 N. Y. Super. Ct. 275; *Martin v. Martin*, 14 Oregon 165; *Stretch v. Gowdey*, 3 Tenn. Ch. 565.

In some States it is provided by statute that the compensation of receivers shall be left to the discretion of the courts. For instance, in *Rhode Island*, by Gen. Sts., ch. 140, § 46, a "reasonable" compensation is allowed. In *Virginia* (Code of 1887, § 3411) a receiver is to receive, as a compensation for his services, such percentage of the amount received, and invested or paid out by him, as the court may direct, for receiving, investing or paying out the same.

Fixed by Analogy to Compensation of Fiduciaries.—In some States the courts have established the rule of allowing receivers the same compensation as that given to executors, administrators, guardians, and other fiduciaries. In *Alabama* the rate of compensation allowed to guardians is held to fix an appropriate, though not an imperative rule, in the case of receivers. *Magee v. Cowperthwaite*, 10 Ala. 966.

In *Maryland* the commission allowed to trustees on sales made under decrees and orders of court, furnishes the proper standard of compensation for receivers, with discretion to increase it in case of extraordinary trouble or difficulty, or to reduce it in case of negligence. *Abbott v. Baltimore, etc., Steam Packet Co.*, 4 Md. Ch. 314; *Tome v. King*, 64 Md. 180.

In *New Jersey* receivers are dealt with as trustees under a will, or as executors having real and personal estate in charge. *Holcombe v. Holcombe*, 13 N. J. Eq. 417. When the case does not fall within the statutes, compensation will be awarded to receivers at the same rate as to executors and administrators. *Howes v. Davis*, 4 Abb. Pr. (N. Y.) 71; *Bennett v. Chapin*, 3 Sandf. (N. Y.) 673; *Muller v. Pondir*, 6 Lans. (N. Y.) 481. Compare *In re Kellogg*, 7 Paige (N. Y.) 265. But this is only true it seems, in the absence of proof as to the amount of labor performed by a receiver; *Muller v. Pondir*, 6 Lans. (N. Y.) 472; otherwise the rule is not binding, and the court by whom a receiver is appointed has the right to determine the rate of his compensation, which may be fixed with reference to the circumstances of the case. *Gardiner v. Tyler*, 3 Keyes (N. Y.) 505; 2 Abb. App. Dec. 247; *Baldwin v. Eazler*, 34 N. Y. Super. Ct. 274.

In instances where the rule prevailing in the case of executors and administrators is applied to receivers, one-half the compensation is given for receiving and one-half for paying out moneys. *Howes v. Davis*, 4 Abb. Pr. (N. Y.) 71. The receiver is entitled also, in addition to percentages on money received and paid, to commissions on the value of all the assets (for example, book accounts and other things in action) taken out of his hands and delivered to the parties by an order settling the suit. *Bennett v. Chapin*, 3 Sandf. (N. Y.) 675.

Same—England.—44 & 45 Vict. ch. 41, § 24, sub-section 6, provides that a receiver appointed by a mortgagee shall be entitled to retain, out of any money received by him, for his remuneration and in satisfaction of all costs, charges and expenses which he incurs as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his order of appointment; and that, if no rate be specified, then at the rate of

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five per centum on that gross amount, or at such rate as the court think fit to allow on an application made by him for that purpose.

Receivers—Additional Compensation.—The regular compensation made to a receiver for his services is considered sufficient to compensate him for all the labor which he performs in connection with the receivership, and hence, as a rule, no additional allowance will be made. *Beach on Rec.*, § 769; *In re Ormsby*, 1 Ball & B. 189; *Malcolm v O'Callaghan*, 3 Myl. & C. 52; *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.) 287; 21 Am. Dec. 86; *In re Bank of Niagara*, 6 Paige (N. Y.) 216; *Hynes v. McDermott*, 3 N. Y. St. Rep. 585.

So also a receiver will not be allowed extra compensation for services and expenses incurred by him in making journeys to a foreign country for the purpose of prosecuting legal proceedings to recover money due the estate, when such journeys have not been expressly authorized by the court, even though authorized and approved by many of the parties interested in the estate. In passing upon the question of compensation in such a case, the court will not consider any agreements made by the parties in interest with the receiver, with regard to his undertaking such journeys, or his compensation therefor. *Malcolm v. O'Callaghan*, 3 Myl. & C. 152; 1 Jur. 838.

Nevertheless a receiver may be granted allowances beyond his regular compensation for any extraordinary trouble or expense he may have been put to in the performance of his duties. 2 Dan. Ch. Pract. (5th Ed.) 1747; *Farmers' L. & T. Co. v. Central R. Co.*, 2 McCrary (U. S.) 318, 8 Fed. Rep. 60; *Adams v. Haskell*, 6 Cal. 475; *Williamson v. Wilson*, 1 Bland (Md.) 433.

The compensation paid to the receivers of railroad companies is not upon the same basis as that paid to other receivers. "The chancellor selects a person whom he regards to be competent and trustworthy, and the amount of compensation is graduated somewhat by the duties and somewhat by the responsibilities of the situation. Where a receiver is a manager as well as a mere receiver, his duties and responsibilities are largely increased; and the management of a business like that of a railroad is one of the most difficult and responsible duties that a receiver is charged with. It requires a man of first rate qualities and attainments. *Cowdrey v. R. R. Co.*, 1 Woods, 331. The compensation should, therefore, be liberal. *McArthur v. Montclair R. R. Co.*, 27 N. J. Eq. 77.

Sometimes the salary of the president of the road is fixed upon as the receiver's compensation. *Malory v. Brown*, 12 Heisk. Tenn. 597. And where this is the case, or indeed where the receiver agrees to act for any fixed sum, he will not be allowed more on the plea that his duties have proved more arduous than he expected. *Farmers' Loan and Trust Co. v. Central R. R. of Iowa*, 2 McCrary, 318.

It should, however, be remembered that, in many instances, the president's salary is very inadequate compensation for the receiver. The road is apt at the time it passes into his hands to be in a state of disorganization which requires consummate skill and ability on the part of the receiver, and a much greater expenditure of time and labor than is expected from the president of the road in its ordinary management. His compensation should be graduated accordingly. *Cowdrey v. R. R. Co.*, 1 Woods, 331.

It is the duty of the receiver to perform his duties with fidelity and economy, and to so manage the affairs of the company as to make the least possible expenditure. He is not, therefore, entitled

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to extra compensation for uniting the offices of auditor and cashier, and for disbursing the money for debts contracted by his predecessor. *Farmer's Loan & Trust Co. v. Central R. R. Co. of Iowa*, 2 McCrary, 318. He is not, therefore, required to himself perform any other duties than those strictly executive. Hence, if he does extra work for the company and travels beyond office hours and at night; if he takes upon himself the duties of superintendent and appears as attorney for the company so as to save it counsel fees, he is entitled to additional compensation for these services. So also where he is suddenly and unexpectedly called upon by the court to furnish accounts and statements to be used in the course of pending litigation, he is entitled to extra compensation. *Farmers' Loan & Trust Co. v. Central R. R. of Iowa*, 2 McCrary, 318.

 ARCHAMBEAU

v.

NEW YORK & N. E. R. Co.

(Supreme Judicial Court of Massachusetts, Feb. 24, 1898.)

Receiverships—Personal Injuries—Liability.*—Where the railroad on which the accident happened was turned over by the receivers to defendant, a new corporation, on the day subsequent to that on which the injuries, for which the action was brought, were sustained, defendant was not liable, the control of such road by the receivers having been adverse as to defendant.

Same.—And such defense was admissible under a general denial.

REPORT from Worcester county superior court.
Verdict for defendant and judgment on the verdict.

William A. Gile and Charles T. Tatman, for plaintiff.

Frank P. Goulding and Wm. C. Mellish, for defendant.

HOLMES, J. This is an action of tort for personal injuries sustained while the defendant's road was in the hands of receivers. It happened that the next day after the accident the receivers turned over the property to a new corporation, so that the case suggests a possible hardship. But in the opinion of a majority of the court, the defendant cannot be made liable on that account for an

Receiverships—
Personal Injuries
—Liability.

*See note at end of case.

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act done by persons who were not its agents or servants, but were put in control of its property by an adverse act. *Railroad Co. v. Davis*, 23 Ind. 553; *Turner v. Railroad Co.*, 74 Mo. 602; *Railway Co. v. Stringfellow*, 44 Ark. 322, 324; *Railway Co. v. Searle*, 11 Colo. 1, 16 Pac. 328; *Railroad Co. v. Hoechner*, 14 C. C. A. 469, 67 Fed. 456; *Metz v. Railroad Co.*, 58 N. Y. 61, 66; *Brockert v. Railway Co.*, 82 Iowa, 369, 47 N. W. 1026; *Railway Co. v. Huffman*, 83 Tex. 286, 18 S. W. 741; High, Rec. (3d Ed.) § 396; Beach. Rec. (2d Ed.) §§ 384, 726; 2 Elliott, R. R. § 581. The special grounds upon which it has been thought proper to charge a corporation, to the extent of property in its hands paid for out of income by the receiver, do not exist. *Railroad Co. v. Davis*, 62 Miss. 271; *Railway Co. v. Johnson*, 76 Tex. 421, 13 S. W. 463; *Id.*, 151 U. S. 81, 99, 14 Sup. Ct. 250. As the defense shows that the defendant did not do the acts complained of,

it is admissible under a general denial.
same. *Railroad Co. v. Davis*, 23 Ind. 553, 561.

Judgment on the verdict.

NOTES.

Receivership—Personal Injuries—Liability.—Railroad companies are not liable for injuries inflicted upon persons or property while its railway is being managed and operated by a receiver. *Rogers v. Mobile & Ohio R. R. Co.*, 12 Am. & Eng. R. Cas. p. 442.

Where a receiver has taken sole and exclusive control of a road and himself employs the agents and servants operating the same, the company is absolved from all responsibility for injuries resulting from the negligence of such agents or servants. They are the agents or servants of the receiver and not of the company. *Ohio & Miss. R. R. Co. v. Davis*, 23 Ind. 553; *Bell v. Indiana Cinn. & Laf. R. R. Co.*, 53 Ind. 57, and see *Murphy v. Holbrook*, 20 Ohio St. 137. In like manner no action will lie against the company for the breach of a contract to carry goods made with the receiver. *Ellis v. Indianapolis C. & L. R. R. Co.*, 6 Am. Law Record, 288.

It is often urged that the fact that the profits earned during the receivership may possibly enure to the benefit of the company, is sufficient to constitute the receiver the company's agent, and to render it liable accordingly. But this view has met with no favor from the courts.

Where such an officer is appointed in an adverse bankruptcy proceeding, and he takes sole possession and control, the company is

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not responsible for the negligence of his servants or agents. *Metz v. Buffalo, etc., R. R. Co.*, 38 N. Y. 61.

Where pending foreclosure proceedings the President and Directors of the company are ordered by the court to continue in possession and to operate the road as theretofore, they are to be considered as its receivers, and the corporation is not responsible for accidents occurring during their administration. *Ex parte Brown, et al.*, 15 S. C. 518, 9 Am. & Eng. R. Cas. 723.

The receiver of a railroad company is the representative of the court, and not of the company, and the company is not liable for his acts or those of his employees. Where evidence adduced showed that the injury occurred from the operation of a train on the defendant's road, and a presumption arose therefrom that the persons in charge of the train were its employees, the defendant may, if it has pleaded a general denial, show that the servants in charge of the train were not its servants, but those of the receiver operating the road under the decree of a court of competent jurisdiction. For the purpose of showing that at the time of the injury the road was being operated by a receiver, a decree, dated prior to the injury, which placed the property and management of the road in the hands of the receiver, ought to be admitted. But if, at the same time, a second decree, showing the time of the discharge of the receiver is tendered, neither it nor the decree appointing the receiver ought to be admitted, if it shows by its recitals that prior to the accident a former decree had been rendered in the case, which took the road from his hands and discharged him from the duty of operating the line. *Kansas & Gulf Short Line R. Co. v. Dorough (Tex.)* 10 S. W. Rep. 711.

If a railroad is in the hands of a receiver, the company is not liable for injuries which are caused by the negligence of the receiver or his agents or servants. *Rogers v. Mobile & O. R. Co.*, 12 Am. & Eng. R. Cas. 442; *Memphis and L. R. Co. v. Stringfellow*, 44 Ark. 323, 21 Am. & Eng. R. Cas. 374; *Ohio & M. R. Co. v. Anderson*, 10 Ill. App. 313; *Ohio & M. R. Co. v. Davis*, 23 Ind. 553; *Bell v. Indianapolis, Cincinnati & L. R. Co.*, 53 Ind. 57; *Thurman v. Cherokee R. Co.*, 56 Ga. 376; *Metz v. Buffalo C. & T. R. Co.*, 58 N. Y. 61; *Turner v. Hannibal & St. J. R. Co.*, 74 Mo. 602; *Dillingham v. Anthony*, 37 Am. & Eng. R. Cas. 1.

If, however, the company allows the tickets to be printed in its name and otherwise holds itself out to the public as operating the road, it will be liable for injuries occasioned to one who did not know of the receiver's appointment. *Washington, A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 445. And if the railroad company in constructing a culvert over a stream failed to provide for the free flow of such amount of water as might reasonably be anticipated to flow in a stream, it is liable for an injury caused by the insufficiency of the culvert even if, at the time of the injury, the management of the road has passed into the hands of a receiver. *Union Trust Co. of New York v. Cuppy*, 26 Kan. 754, 11 Am. & Eng. R. Cas. 562.

Where an absolute liability is fixed upon a railway by statute, as when the company is made by statute absolutely liable for the killing of stock in cases where its road is not securely fenced, the fact that the affairs of the company have passed into the hands of a receiver constitutes no defence to an action against the company. *Ohio & M. R. Co. v. Russell*, 115 Ill. 52, 23 Am. & Eng. R.

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Cas. 149, and *note* 153. The fact that a railroad is in the hands of a receiver is no defence to an action against the company under the Illinois acts of 1874, to recover double the value of a fence built along the railroad track by an adjoining land owner on the failure of the company to build. *Ohio & M. R. Co. v. Russell*, 115 Ill. 52, 23 Am. & Eng. R. R. Cas. 149.

UNION PAC. RY. CO., *et al.*

v.

SMITH.

(*Supreme Court of Kansas, Feb. 5, 1898.*)

Actions against Receivers for Personal Injuries—Parties.—A petition alleging a cause of action against a railway company and certain persons named as receivers of its property is not demurrable on the ground that it shows a defect of parties, nor on the ground that it fails to state a cause of action against either one because the other is charged also with the same liability.

Same.—Joint Judgment—Liability of Company.*—A plaintiff, having a just cause of action for injuries caused by the management of a locomotive engine, may prosecute his action against both the railway company and receivers appointed to take charge of its property, and may in one action establish his demand against whichever is legally liable. But, where the receivers are in entire and exclusive control of the property of a railway company, they alone are responsible for injuries occasioned by the negligent management of the property; and a joint judgment against both the receivers and the railway company for an injury so caused is erroneous so far as it imposes liability on the railway company.

Same.—In such a case where a verdict is rendered in favor of the plaintiff, without naming either of the defendants, it will be construed as a verdict against the receivers alone; and a judgment entered on such verdict against both the receivers and the railway company will be modified by vacating the judgment against the railway company.

(Syllabus by the court.)

ERROR by defendant to Leavenworth county district court. *Modified and affirmed.*

A. L. Williams, N. H. Loomis, and R. W. Blair,
for plaintiffs in error.

John T. O'Keefe and Wm. A. Porter, for defendant
in error.

*See preceding case, and *note* thereto.

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ALLEN, J. Fred Smith brought suit in the district court of Leavenworth county against the Union Pacific Railway Company and S. H. H. Clark and others, as receivers of the Union Pacific Railway Company, to recover damages for personal injuries alleged to have been caused by the negligence of the servants of the defendants. The petition alleges that the railway company owned and operated at the time of the injury a line of railroad extending from Third street, in the city of Leavenworth, along Choctaw street, to Broadway, and thence to Topeka; that, in an action pending in the circuit court of the United States, the defendants Clark, Mink, Anderson, Doane, and Coudert were appointed receivers of the Union Pacific Railway Company, and of all its branches, leased lines, tracks, locomotives, and cars, and authorized to manage and operate the same; that before and ever since the 6th of January, 1894, the railway company and the receivers used and operated their engines and cars over the line of road on Choctaw street, and across Fourth street, in the city of Leavenworth; that on the 6th of January, 1894, plaintiff was driving his horse hitched to a cart along Fourth street, towards the crossing of the railroad on Choctaw street; that as he approached Choctaw street, Union Pacific engine No. 1204, with cars attached thereto, in charge of the defendant's engineer and servants, was backed across Fourth street; that, when the plaintiff was within about 30 feet of the track, he stopped his horse to wait until the train should pass; that, while so waiting, the defendant's servants in charge of the engine carelessly and unnecessarily reversed the engine, and suddenly opened the steam cocks on the cylinder of the engine, thereby emitting a cloud of steam in the face of the plaintiff's horse, and causing startling, hissing noises, which frightened plaintiff's horse, so that it became unmanageable, ran away, upset his cart, and threw him with great violence against the edge of the sidewalk, breaking his right clavicle, and otherwise injuring him. The petition alleges that the horse was gentle, and accustomed to

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the usual and ordinary operation of trains, from which he did not take fright. Other matters are alleged which it is unnecessary to state. To this petition the railway company and the receivers filed separate demurrers, on the ground that there was a defect of parties defendant, and that the petition did not state facts sufficient to constitute a cause of action. Both demurrers were overruled. The defendants then answered separately, denying specially that on the 6th of January, 1894, they were operating, or had any authority to operate, the railroad of the Leavenworth, Topeka & Southwestern Railway Company, or any portion thereof, and alleging that whatever injury the plaintiff received was caused by his own fault and negligence. The plaintiff replied, denying the averments of the answer. When the case was called for trial, the defendants severally moved that the plaintiff be required to elect against which of the defendants he would proceed to trial and ask for judgment. This motion was overruled. The case was tried to a jury, and resulted in a verdict and judgment in favor of the plaintiff, for \$5,000 damages. The railway company and the receivers now seek a reversal of the judgment.

The main contention of counsel for plaintiffs in error is that the claims of the plaintiff, as set forth in the petition and urged at the trial are inconsistent; that it cannot be that the railway company and the receivers appointed by the court to take charge of and operate its property were both in control of the property at the same time. It is also contended that, as a matter of fact, neither the Union Pacific Railway Company nor the receivers operated the Leavenworth, Topeka & Southwestern Railway, or the engine which caused the injury to the plaintiff. The petition was not demurrable on the ground of a defect of parties defendant. A defect of parties, within the meaning of the statute, is a lack of parties, not an excess. *McKee v. Eaton*, 26 Kan. 226; *Hurd v. Simpson*, 47 Kan. 372, 27 Pac. 961. The petition certainly stated

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facts sufficient to constitute a cause of action against the receivers. We are not prepared to say that it is palpably impossible that there should be a legal liability resting on the railway company and its receivers for the same act. There was no error in refusing to require the plaintiff to elect which defendant he would proceed against. He had a right to prosecute his action against both, and recover judgment against whichever the proof might show was liable. The facts disclosed at the trial, however, clearly show, without dispute, that all the property of the railway company with which we have any concern in this case was under the management and control of the receivers, and they, as such receivers, were alone responsible for the acts of the servants in charge of the engine. The order appointing the receivers appears to have been made by JUDGE DUNDY at Omaha, on the 13th of October, 1893. The appointment was made in an action brought by Oliver Ames and others against the Union Pacific Railway Company and a large number of other corporations, among which the name of the Leavenworth, Topeka & Southwestern does not appear. The receivers were directed to take charge of all the property of the Union Pacific Railway Company, and also all the system of railways then in the possession of, owned, operated, leased, or controlled by, for, or in the interest of, the said corporations, in the states of Nebraska, Kansas, and other states and territories named. The distinction sought to be made at the trial and in this court between the Union Pacific Railway and the Union Pacific System may be sound, as affecting the liability of the railway company; but it is perfectly clear that the receivers were, in fact, the receivers of the Union Pacific System. The engineer and fireman in charge of Union Pacific engine No. 1204, at the time the plaintiff received his injury, testified that they were employed to work for the Union Pacific, and that they received their pay for their work in the month of January, 1894, from the Union Pacific pay car, in checks

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bearing the names of the receivers. There is really no conflict in the evidence raising a substantial question as to who was operating this particular engine, nor as to its ownership. It is a matter of no consequence in this case whether on the 6th of January, 1894, the receivers were operating the Leavenworth, Topeka & Southwestern Railroad with the rolling stock of the Union Pacific, in charge of their employees, under a misapprehension as to the scope of the order appointing them, or not. The only matter which concerned the plaintiff was that it was their servants operating the property under their control that caused his injury. The instruction of the court criticised by counsel is sound. The receivers cannot claim exemption from liability merely because they are using the track of another company in the transaction of their business at the time the plaintiff was injured.

Whether letter-press copies of waybills showing the transfer of cars from the Santa Fe to the Union Pacific, produced in evidence by the agent of the Santa Fe, from records kept under his direction, were competent evidence for the purpose for which they were offered, is a matter of some doubt. But, even if it be conceded that they were incompetent, the error in their admission is quite unimportant. The only bearing the evidence had was in tending very remotely to prove who was operating Union Pacific engine No. 1204 on the 6th of January. This fact was clearly established by an abundance of competent and direct testimony.

The form of the verdict is criticised. It is as follows :
"We, the jury, impaneled and sworn in the above-entitled cause, do, upon our oaths, find for the plaintiff, and assess his damages at the sum of \$5,000." This was in accordance with the instruction of the court, which is also criticised. Under the view of the case already indicated, this verdict must be construed as one against the receivers only, no cause of action having been proved against the railway company. It must also be held that the receivers were not materially prejudiced by the instruction of the court, or the sub-

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mission of the case to the jury as one against both defendants.

The complaint urged because of the admission of the testimony of various witnesses to the effect that the engine causing the injury was a Union Pacific engine, and that the employees were employees of the Union Pacific or the Union Pacific System, is without substance. In speaking of a railroad in the hands of receivers, it is usually designated by the name of the road or of the corporation owning it, rather than that of the receivers. No confusion ordinarily arises, and there is none in this case. Proof that the property was Union Pacific property was competent evidence against the receivers, whose duty it was to have charge of the property. Proof that the employees were Union Pacific employees was good proof that they were employees of the receivers when the fact became clearly established that the receivers had entire and exclusive control of all the properties of the company, and of the transaction of all its business. The judgment must be modified by setting aside the judgment against the Union Pacific Railway Company. The judgment against the receivers is affirmed. All the justices concurring.

COOS BAY, R. & E. R. R. Co. & NAV. Co.

v.

SIGLIN.

(Supreme Court of Oregon, June 20, 1898.)

Ownership of Rails upon Company's Wharf—Minutes—Evidence—Admissibility.*—In an action to recover possession of certain steel rails alleged by plaintiff to be its property, and claimed by defendant to have been held by plaintiff in secret trust for its manager, it was not error to admit in evidence certain minutes of a meeting of the board of directors of plaintiff, such minutes tending to im-

*See note at end of case.

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peach plaintiff's alleged title, and having been admissible under the pleadings.

Same—Instructions.—There was evidence tending to show certain pertinent facts; and it was not error to state in the charge that it had such tendency, the statement having been made to attract the attention of the jury to the specific point of law upon which the court desired to instruct.

Same—Validity of Levy.—The mere fact that the rails were piled upon plaintiff's wharf did not constitute such possession of it as to prevent a levy upon them as the property of another party.

Same—Question for Jury.—The evidence as to the ownership of the rails being conflicting, it was properly submitted to the jury.

Same—Form of Judgment.—The jury having found that such manager was the general owner of the property, and defendant (the sheriff), having levied upon all of it, being responsible to the manager for it all, it was not error to enter alternative judgment for the return of the rails, or their full value.

APPEAL by plaintiff from Coos county circuit court.
Affirmed.

J. W. Hamilton, for appellant.

S. H. Hazard, for respondent.

WOLVERTON, J. This is an action to recover the possession of 924 steel T rails, with fish plates to match, and a lot of bridge bolts and washers. The defendant was the sheriff of Coos county, and, as such sheriff, justifies his possession and holding by reason of having seized the same as the property of one R. A. Graham, by virtue of an execution duly issued upon a certain judgment of the circuit court for said county in favor of one Miller, and against the said Graham, and further alleges, in effect, that, at the date of the levy, Graham was the owner of the property in question, but that, being indebted to Miller and others in large amounts, he entered into a conspiracy with the plaintiff to defraud his said creditors, whereby plaintiff was to claim and hold said property for the use and benefit of Graham, and that plaintiff now claims and holds the same in pursuance of said conspiracy, in secret trust for the said Graham, with intent to enable him to so cover up and dispose of such property as to hinder, delay, and defraud his said creditors, but that it has no interest therein whatever. For its source of title, plaintiff claims that it purchased the property

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through Graham, its manager, from the Peninsular Railway Company of Lower California; and that J. D. Spreckels, Bros. & Co. advanced the funds necessary to the purchase, under an agreement that plaintiff would issue to the said Spreckels Company certain of its bonds, to secure them in the repayment of the amount so advanced. The theory of defendant is that Graham, while it is conceded he was the manager of the plaintiff company, was also under contract with plaintiff to build and construct certain portions of its road, and, to that end, agreed to furnish all work, labor, and material necessary for the purpose, and, in consideration thereof, was to receive from the plaintiff an assignment and transfer of all its subsidies, together with the mortgage bonds of the company, at the rate of \$25,000 per mile; that the rails in question were purchased by Graham upon his own account, for use by him in the construction of said road under his contract, and not for the plaintiff; and that plaintiff never owned nor possessed any interest in them whatever.

To establish its case, plaintiff produced one F. S. Samuels, who testified, in substance, that he was the manager of a large portion of J. D. Spreckels, Bros. & Co.'s business; that said company authorized the purchase of the rails with its own funds for, and directed the shipment thereof to, plaintiff; and that the funds were advanced on the strength of the railroad company's securities. This was in the latter part of 1891 or first of 1892. Other evidence was produced tending to show the shipment of the rails direct to the railroad company, and an acceptance of them by it upon the its wharf in Marshfield, Ore. When plaintiff had rested, the defendant offered, and the court admitted, over plaintiff's objection, the minutes of a meeting of the board of directors of the railroad company, held August 19, 1890, showing the election of its officers, the adoption of by-laws, the appointment of R. A. Graham as manager, and the entering into and execution of a contract between the company and Graham for the construction

Ownership of Rails
upon Company's
Wharf - Minutes—
Evidence—Admissibility.

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of its road ; a copy of which being spread upon the minutes, its terms and conditions were thereby disclosed. The objection to the introduction of these minutes was that they do not tend to impeach the title of plaintiff, because the making of the contract was not within sufficient proximity, in point of time, to the date of the purchase, to create a presumption that Graham was still working under the contract, in the absence of a showing that they were purchased by him with a purpose of fulfilling the contract. Minutes of subsequent meetings of the board were introduced, tending to show that, up to and subsequent to the commencement of the action, both parties were treating the contract as subsisting and operative, and were proceeding in the discharge of its terms and conditions, without change or modification; and those were also admitted over like objections. There was evidence produced by the defendant tending to show that Graham purchased the rails upon his own account, and gave his promissory note for the purchase price, with certain bonds of the railroad company as collateral, and that they were shipped to Marshfield in his name, and marked with his initials. It is perfectly apparent that the minutes were pertinent to show the business relations existing between the plaintiff corporation and Graham, from the time of the inception of the contract up to and subsequent to the purchase of the rails, and their treatment of the contract as in force and effective during the while, as they serve to throw light upon the contested question whether Graham purchased as manager for the road or upon his own account, in furtherance of the execution of the contractual conditions upon his part. Besides, the further testimony, tending to establish the direct purchase of the rails by Graham individually for use in the fulfillment of his engagements under the contract, sufficiently answers the very objections taken. Aside from this, the answer laid the foundation for a wide range of investigation; and the testimony was not a whit without its scope, and tended directly to the establishment of defendant's

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theory of the case, and therefore, indirectly, to the impeachment of plaintiff's title, all of which was proper matter for the jury. There was no error in the admission of these minutes, and the objections thereto were properly overruled.

In this connection we will advert to an exception taken to a portion of the court's charge to the jury, as follows: "There is some evidence in this case tending to show that said Graham was at said time engaged in the construction of a railroad for plaintiff under a contract which required him to furnish all the material, of every kind and description, that entered into the construction of said railroad; and there is some evidence tending to show that the purchase price of the property described in the complaint was paid by R. A. Graham, and not by the plaintiff." The objections assigned to the instruction are: First, that there was no evidence in the record (and we have all the evidence here) tending to show what the court asserts; and, second, that it was improper for the court to tell the jury that there was evidence tending to show certain facts pertinent to the issues. Upon the first proposition there can be no question but that the court is sustained by the record, and upon the second it is sustained by the case of *State v. Brown*, 28 Or. 147, 41 Pac. 1042. The language was used to attract the attention of the jury to the specific point of law upon which the court desired to instruct. It did not tell them that the fact or facts had been established, but that there was evidence tending to their establishment, and for that reason the instruction became necessary for their guidance in passing upon the question. If it may be said that the method of attracting the jury's attention to the direct point upon which the court was about to instruct is subject to criticism, it could have done no harm in the present case, as the jury no doubt fully understood from the instruction their duty in the premises.

Exceptions were also taken to the following instruc-

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tion, *viz*: "If you should find from the evidence that the rails, at the time the levy was made, were in the possession of the railroad company, then the sheriff would have no right to take possession as the property of Graham; but the mere piling of the rails upon the wharf of the railroad company would not constitute such a possession of them by the railroad company as would prevent the sheriff from making a valid levy upon them as the property of Graham, if you find that the rails were in fact the property of Graham." This instruction was given in view of a question made at the trial whether the sheriff should not have garnished the railroad company, instead of taking the property into his custody, and involved the further question whether the property was then and there in the possession of Graham or the company. As has been stated, there was evidence tending to show that the rails were purchased by Graham, and shipped to him, and received by him at the wharf at Marshfield, Or.; and it was a question for the jury to decide as to which of these parties had the possession in determining the legality of the levy. In view of the issue, the instruction was pertinent; and this disposes of the instruction touching the same matter asked by plaintiff and refused by the court.

Same—Validity of
Levy.

Another assignment of error is based upon an instruction requested by plaintiff, as follows: "You are instructed that the evidence in this case shows the general title of the property in dispute to be in the plaintiff, and you should so find in your verdict." The court refused this instruction, and properly so, because there was an issue in the case whether plaintiff or Graham was the general owner; and, the testimony touching such ownership being conflicting, it became a question of fact for the jury to determine. The jury found, by their verdict, that R. A. Graham was, at the time of the levy, the owner of the property, and that defendant acquired a special interest therein by virtue of such levy, and found the value of the entire property to be \$10,000.

Same—Question
for Jury.

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And this brings us to the final question touching the controversy. The plaintiff having taken the property from the defendant at the institution of the action, the judgment was entered for the return of the property to the defendant, and, if a return could not be had, then for its entire value as assessed by the jury. It is insisted that it was error to have so entered the judgment, and that the alternative judgment should have been for the value of defendant's special property or interest therein only, which would be measured by the amount he was directed to make under the execution. The exact contention is stated by counsel as follows: "Where the defendant has but a limited interest, which is less than the value of the property, judgment in his favor should not be for the full amount, unless he is liable to the general owner, but should be only for the amount of his special interest." The rule governing under statutes similar to ours appears to be this: "If the pleadings and evidence show that the party recovering is the general owner, or is a bailee, and connects himself with the general owner, the jury are to assess the full value of the goods. If they show that he has only a special property in the goods, and the general property is in the other party, they are to find, * * * as the value of the property, only the value of the interest of the party recovering,"—quoting from *Booth v. Ableman*, 20 Wis. 23, 27. See, also, *Bleiler v. Moore*, 88 Wis. 438, 60 N. W. 792; *Shahan v. Smith*, 38 Kan. 474, 16 Pac. 749; *Witkowski v. Hill*, 17 Colo. 372, 30 Pac. 55. Now, under this rule, if it had been found that plaintiff was the general owner of the property, the alternative judgment of value should have been for the amount of the special interest only. But the jury has found that Graham, and not the plaintiff, was the general owner; and the defendant, having taken the property from Graham, is answerable to him for its disposal. He occupies the position of a bailee; and, if there is any overplus of the property after satisfying the execution, he must return it to Graham, from whom he took it. If he fails in

Name—Form of
Judgment.

Note

obtaining a return of the property from the plaintiff, he still would be accountable for its full value to Graham, and it would be unjust and inequitable to permit him to recover only a part of its value. Such a rule would greatly imperil the sheriff in the discharge of his duties. The principle is determined by the case of *Dean v. Lawham*, 7 Or. 422, which is applicable here, and the judgment of the court below will therefore be affirmed.

NOTE.

Evidence—Minutes and Records of Company—Admissibility.—Corporation books are evidence of the acts and proceedings of the corporate body, when it appears that they are kept as such by the proper officers, or some person authorized to make entries in their necessary absence. *St. Louis & C. R. R. Co. v. Eakins*, 30 Iowa 279; *Woonsocket Union R. Co. v. Sherman*, 8 R. I. 564.

The acts, resolutions, and proceedings of an incorporated company, through their directory, are competent evidence against the company, and especially a director who was present. *Gratz v. Redd*, 4 B. Mon. (Ky.) 178.

The book of minutes of a railroad company may go to the jury for the purpose of proving what took place at several meetings of stockholders, called for the purpose of procuring a loan for the company, with which an indemnity bond in question was immediately connected. *Black v. Lamb*, 12 N. J. Eq. 108.

The books of minutes containing the resolutions of a board of directors, authorizing an issue of stock, are competent evidence to show authority for such issue. *Boardman v. Lake Shore & M. S. R. Co.*, 4 Am. & Eng. R. Cas. 265, 84 N. Y. 157.

The minutes of a corporation are not evidence of an agreement alleged to have been made by the stockholders as individuals, and not intended to bind the corporation. *Black v. Shreve*, 13 N. J. Eq. 455.

Defendant offered in evidence books or memoranda kept by its own officers or employees, for the purpose of establishing that no car of the defendant was crowded at the time of the accident, and that no information was given or reported by the defendant's employees in regard to the accident. *Held*, to have been properly excluded. *Dickson v. Ridge Ave. Pass. R. Co.*, 19 Phila. (Pa.) 430.

Coll v. Easton Transit Co

COLL

v.

EASTON TRANSIT CO.

(Supreme Court of Pennsylvania, April 12, 1897.)

Killing of Pedestrian on Street Railway Tracks—Negligence—Question for Jury.—In an action against a street railway company to recover damages for the negligent killing of deceased, the evidence was to the effect that he was seen after dark on a narrow path between the track and an embankment about 80 or 90 feet from the car which was approaching him from down grade, and that D., a lineman, riding with the motorman on the front platform, was seen to jump from and run in advance of the car, which was not stopped until afterwards, and then deceased was found partially beneath it, and D. was holding him by the legs. *Held*, that it was for the jury to decide whether or not D. saw deceased fall upon the track, and ran forward to assist him, the inference being, if these facts were found, that the motorman saw or should have seen deceased in time to prevent the accident; and it was error to enter a nonsuit.

Evidence—Admissibility—Res Gestæ.*—And the statements of D., made immediately after the accident and before the injured man was taken from the track, that he had run ahead to pull him out of danger and did not have time to do so, were admissible as part of the *res gestæ*, though D. had nothing to do with the running of the car.

Same.—And the statement of the motorman made two minutes after the accident, while he was in charge of the body, that he could have stopped the car in time to prevent it, but supposed D. would succeed in pulling deceased out of danger before his car could injure him, was also admissible as part of the *res gestæ*.

APPEAL by plaintiff from Northampton county court of common pleas. *Reversed*.

William C. Shipman and *Henry S. Cavanaugh*, for appellant.

W. S. & M. Kirkpatrick and *Russell C. Stewart*, for appellee.

FELL, J. It appeared from the testimony presented by the plaintiff that, at the time of the accident, the

*See note at end of case.

defendant's car was running after dark on a declining grade, on a road which passed along the top of an embankment. Between the tracks of the railway and the edge of the embankment was a footpath covered with cinders, and varying in width from four to six feet. At the outer edge of the path was a guard rail supported by posts. The road-bed was in an unfinished condition. The earth which had been thrown out in making an excavation for the track had not been replaced, the ties were exposed, and the rails projected above the surface of the road. The plaintiff's husband, when last seen before the accident by the witness called at the trial, was on the footpath 80 or 90 feet from the car. Dalton, a lineman in the employ of the defendant company, who had been riding with the motorman on the front platform of the car, was seen by the witness to jump from the car, and to run forward in advance of it. The speed of the car was not checked until it was brought to a sudden stop. The person injured was then found behind the car, his legs having been run over by it, and Dalton had hold of him.

Case Stated.

From these facts it may be inferred that the deceased, finding himself in a position of danger on the narrow path, and fearing that he would be crushed between the projecting side of the car and the guard rail, attempted to reach a place of safety by crossing the road, and, in so doing, he tripped, and fell across the track, and that Dalton saw him fall, and ran to assist him. There is no other explanation of Dalton's conduct in jumping from the car, and running ahead, in connection with the fact that he had hold of the man immediately after his legs were crushed. If Dalton saw the man when he fell, the motorman, who was standing on the same platform, and whose duty it was to look ahead, saw him, or should have seen him, when he was 80 feet away, and he should have attempted to stop the car at once. The car was running only half as fast as Dalton ran, and its speed was not checked until it had run 80

Killing of Pedestrian on Street
Railway Tracks—
Negligence—Question for Jury.

feet. Whether these inferences could properly be drawn was a question for the jury. The judge could not say, as matter of law, that they were without foundation on the facts testified to, and it was error to enter a nonsuit.

As the case goes back for trial, it is important that the remaining assignments should be considered. A witness had testified that immediately after the accident, and before the man injured had been lifted from the tracks, Dalton, the lineman, said that he had run ahead to pull him off the track, and did not have time to do it. This testimony, on motion, was struck out; and an offer to prove that the motorman, within two minutes of the occurrence of the accident, and while he and other employees of the company were in charge of the body of the injured person, had said that he could have stopped the car in time, but that he supposed that Dalton would have had the man removed from the track before the car reached him, was rejected.

The testimony relating to Dalton's statement appears to have been struck out for the reason that he was not employed in the operation of running the cars, and that relating to the statement of the motorman to have been rejected for the reason that it was too remote from the occurrence

Evidence—Admissibility—Res Gestæ.

to be admissible as part of the *res gestæ*. Neither ground was well taken. To make his declaration admissible as part of the *res gestæ*, it was not necessary that Dalton should have been in the employ of the company for the purpose of running its cars, or for any purpose. His acts were a part of the occurrence, and they could have been proved if done by an entire stranger. His declarations made at the time explained the nature of his acts and the acts of others, which together made up the whole occurrence under investigation. The declaration of the motorman, of which proof was offered,

Same.

was separated in time two minutes only from the infliction of the injuries. It emanated from the act. It was unconsciously associated with, and stood in immediate causal relation to, it. The oc-

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currence had not yet ended. He was not speaking as the narrator of a past event, but as a participant in an uncompleted one. Both of these declarations clearly come within the comprehensive definition given in Whart. Ev. § 262: "The *res gestæ* may therefore be defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or by-stander. They may comprise things left undone, as well as things done. Their sole distinguishing feature is that they should be necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not promoted by the calculated policy of the actors."

As the plaintiff was allowed to show the actual physical condition of the road at the time of the accident, she was not injured by the exclusion of the testimony referred to in the fourth and fifth assignments; and, as the pleadings stood at the time of the trial it is doubtful whether the testimony was admissible. The first, second, and third assignments are sustained, and the judgment is reversed, with a *procedendo*.

NOTE.

Actions for Personal Injuries—Res Gestæ—Declarations of Servants.—Under certain circumstances declarations of servants made contemporaneously with the accident or very shortly after it are held admissible as part of the *res gestæ*. *Griffin v. Montgomery & West Point R. Co.*, 26 Ga. 111; *Wright v. Georgia R. R. Co.*, 34 Ga. 330; *Atlanta & L. G. Co. v. Hodnett*, 29 Ga. 461; *Covington & L. R. Co. v. Ingles*, 15 B. Monr. 637; *Chicago, B. & Q. R. Co. v. Riddle*, 60 Ill. 534; *Whittaker v. Eighth Ave. R. Co.*, 5 Robt. (N. Y.) 650; *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396; *Brehm v. Great Western R. Co.*, 34 Barb. 256; *Verry v. Burlington, C. R. & M. R. R. Co.*, 47 Iowa, 549; *Houston & T. C. R. Co. v. Wylie*, 5 Am. & Eng. R. Cas. 541; *Pennsylvania Co. v. Rudel*, 6 Am. & Eng. R. Cas. 30; *Adams v. Hannibal & St. Jo. R. Co.*, 7 Am. & Eng. R. Cas. 414; *McLeod v. Ginther's Adm'r*, 15 Am. & Eng. R. Cas. 291.

Smithson v. Chicago, G. W. Ry. Co

SMITHSON

v.

CHICAGO, G. W. RY. CO. *et al.**(Supreme Court of Minnesota, Jan. 14, 1898.)*

Removal of Causes to Federal Court.—When a circuit court of the United States decides that a cause has been improperly removed from a state court, and orders that such cause be remanded, the decision is final, under the federal statute. No appeal or writ of error from such decision is allowed.

Same—Waiver of Right.—A defendant entitled to have his case removed from a state to a federal court, or from the latter to the former, there being no question of jurisdiction over the subject-matter or over the parties, may waive his rights to insist upon a removal by his acts or omissions.

Same.—It is held that a stipulation entered into between counsel for appellant and respondent, while the former was in default for want of answer, settled the controversy as to appellant's right to have the case tried in the federal court, and that thereby the place of trial was fixed in the state court.

Negligence—Rules of Railroad Companies as Evidence.*—The fact that certain rules promulgated and put in force for the guidance and government of railway employees, while operating locomotives, have been violated, may be shown upon the trial of an action for personal injuries said to have been caused by such violation, and the fact may be considered as evidence tending to establish negligence of the defendant.

Same—Statutes.—But such rules do not stand on the same footing as statutes or municipal ordinances, in the nature of police regulations, for the protection of the public or some particular class of persons. The law, statutory or municipal, if valid, fixes the legal standard of duty to those for whose protection it was designed, while private rules may require either more or less than is required by law. Compliance with the latter would not necessarily constitute reasonable care, nor would the violation thereof necessarily constitute negligence.

Joint Use of Tracks—Negligence—Evidence.—On the trial of an action for personal injuries alleged to have been received by plaintiff while employed as a locomotive fireman by one company, through the negligence of the men in charge of the locomotive of another company, and in a collision, both companies using the same tracks, owned by a third company, the rules promulgated by the latter, for the government of all trainmen using the tracks, were put in evidence, together with proof that one or more of these rules were being violated by defendants' (appellants') employees when the collision occurred. The court charged that, if the jury should find from

*See note at end of case.

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the evidence that the rules were being violated when the collision took place, they might consider defendants' negligence as established. *Held*, that this was error.

Harmless Error.—But such an instruction is held to have been error without prejudice, for the reason that, upon the undisputed evidence as to the facts and circumstances surrounding the collision, the trial court would have been justified in charging the jury that defendants' negligence was established as a matter of law.

(Syllabus by the Court.)

APPEAL by defendant from Ramsey county district court. *Affirmed*.

McDonald & Barnard and *T. H. Gill*, for appellants.
John A. Lovely and *J. F. George*, for respondent.

COLLINS, J. Action for personal injuries received by plaintiff while he was serving defendant Chicago Great Western Railway Company as a locomotive fireman, and in a collision between the locomotive on which plaintiff was at work and another Case Stated. operated by defendants Whitcomb and Morris as receivers, under appointment by the United States circuit court, of the Wisconsin Central Railway Company. It was alleged in the complaint that both of these defendants operated locomotives and trains over about four miles of track owned by the Chicago & Northern Pacific Railway Company, in the city of Chicago, and it was on this piece of track that the collision occurred. The negligence alleged on the part of the receivers was in allowing their locomotive to stop and remain standing in the nighttime at a certain place on their track, and when there was imminent danger of a collision, without giving proper or any signals of having so stopped; while the negligence on the part of the Chicago Great Western Company was alleged to be an omission and failure on its part to adopt or establish proper or any rules for the giving of warning signals by its own or other locomotives or trains while being operated on said track.

1. The first question in the case grows out of certain steps taken by the receivers in an effort to remove the cause to the federal courts. To this end, and in due time, the receivers filed a petition for removal and a

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bond in the district court for Ramsey county, in which court the action had been instituted. The other defendant did not join in this petition, but duly answered in the action. An order of the district court removing the cause as petitioned was made, and a few days afterwards, upon the hearing of an order to show cause, the case was remanded by the federal court to the Ramsey county district court upon the ground that it had been improperly removed from the latter, the formal order remanding being filed in February, 1896. The receivers were then in default for want of answer, and on the 4th of June stipulated in writing with plaintiff's attorneys, in consideration of being relieved from this default, and in consideration of their being allowed to answer in the action, that the issues so made should be tried in said district court at the June term, 1896, and that in case of a final judgment against them they would not oppose the allowance of such judgment by the master in chancery. An answer was served in accordance with this stipulation, to which plaintiff replied, and thereafter the cause was continued by consent of counsel for plaintiff and for the receivers until the April term, 1897. It then came on for trial as against both defendants, but counsel for receivers, in disregard of the remanding order of the federal court and of their own stipulation, attempted to interpose an amended answer, alleging, among other things, a want of jurisdiction on the part of the district court, on the ground that the cause had theretofore been duly removed to and was then pending in the circuit court for the United States, and not elsewhere; and also objected to the introduction of any evidence, upon the ground that the case was still pending in the United States circuit court. The district court very properly refused to permit the amendment, and plaintiff submitted his proofs to a jury. Defendants offered no testimony. The court then directed the jury to return a verdict in favor of the Chicago Great Western Company upon the ground that plaintiff had failed to make out a case against it; whereupon counsel for receivers filed another removal petition

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and bond, demanding that, as the Chicago Great Western Company was no longer a defendant, the case was then one for removal. The court below refused to consider the petition, charged the jury, and, in due season, separate verdicts were returned,—one in favor of plaintiff, and against the receivers, for substantial damages; the other, of no cause of action as to the railway company.

There are two sufficient reasons, at least, for holding that the district court did not err in its rulings which finally resulted in submitting the merits of plaintiff's case against the receivers to the jury: First.

The order of the federal court was and is final; for it is expressly provided by 25 Stat. 433, that whenever a circuit court shall decide that a cause has been improperly removed to it

Removal of Causes
to Federal
Court.

from a state court, and shall order the same to be remanded, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court shall be allowed. And the supreme court of the United States has frequently had occasion to refer to this statute, and to declare that the order of the federal court remanding the case is absolutely final. Nor do we find, as claimed by counsel for defendant receivers, that this rule has in any way been qualified or abridged in *Railway Co. v. Fitzgerald*, 160 U. S. 556, 16 Sup. Ct. 389. And this court has held that when a federal court has acted upon the question, and has remanded a case to a state court, as having been improperly removed,—the state court having jurisdiction of the subject-matter and of the parties,—the latter court cannot review the ruling. *Tilley v. Cobb*, 56 Minn. 295, 57 N. W. 799. Second.

The receivers, in consideration of being permitted to answer the complaint after having been in default for several months, expressly agreed to try the case in the state court. Through this agreement they secured a substantial right,—the right to answer. If prior to that time there had been a real controversy over the receivers' right to have the cause

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tried in the federal court, it was then and there settled by a formal stipulation, deliberately entered into by counsel, which they must abide by, and which will be enforced by the courts, in the interest of fair dealing and professional good morals. It seems hardly necessary to conclude on this feature of the case by saying that a defendant who is entitled to have his case removed from a state to a federal court, or from the same.

latter to the former, there being no question of jurisdiction over the subject-matter or over the parties, may waive his rights to insist upon a removal by his acts or omissions.

2. We have stated that the accident occurred upon the track of another company, in the city of Chicago. This company leased the use of its two tracks, one for outgoing the other for incoming trains, to these defendants, from what was known as the "Robey Street Roundhouse" to the vicinity of Forest Home. Both defendants used this roundhouse, and plaintiff worked upon a freight locomotive which usually left the roundhouse about 8:20 p. m., and, taking the train crew, ran out to the yard, about three miles, where it coupled on to its train and proceeded westerly. A freight locomotive, operated by defendant receivers, usually left the roundhouse 15 or 20 minutes later, and, running over the same track, took up its train at the receivers' freight yard, in the same vicinity. On the night in question the locomotive on which plaintiff worked was delayed in starting because of the non-appearance of a brakeman, and, at the request of the engineer, who was employed by the receivers, his locomotive was given the right of way. After it had been gone about 20 minutes the locomotive on which plaintiff worked started. When it reached a point near Forty-Eighth street it ran into the other locomotive, and plaintiff received a severe injury. It appears from the evidence that, when the receivers' locomotive reached a point on the main track about opposite the caboose of the train it was to haul out, which was upon a paralleling yard track, it was stopped, and

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there remained long enough for the other locomotive to run into it. The sole purpose of stopping at this point seems to have been to afford some of the trainmen an opportunity to transfer a large dog from the cab of the locomotive, where it had been riding, to the caboose of the train. There was one red light upon the rear of the tender of the receivers' locomotive, but this was not seen by the men on the other locomotive until it was too late to avert the collision. While stopping, the men operating the locomotive in advance had taken no precautions whatsoever towards protecting themselves from collision. It also appeared from the evidence that the railway company owning these tracks had promulgated and put in force a number of rules for the government of all trainmen while using or occupying these tracks. Several of these rules were applicable to a locomotive or train stopped upon the main track outside of station grounds, and No. 127 was in these words: "Inasmuch as trains may be expected at any time to be entering the yards or sidings, or to stop at any point, without reference to schedules, and as switches are constantly in use, engineers or conductors running trains or engines between Chicago and Central avenue must at all times so control their trains or engines as to be able to stop within the range within which an obstruction of the track and the position of switches can be plainly seen; but nothing in this will be held as an excuse for the failure to display proper signals when trains or engines are held on the main track, and men in charge of trains or engines, when in danger of being overtaken by another train, must protect themselves by flags, lamps, fusees, or torpedoes, promptly, to avoid all possibility of being run into." It will be remembered that, as against the defendant receivers, the negligence relied upon by plaintiff in his complaint arose from the failure of those in charge of their locomotive to guard against collision, while stopping, by putting out or giving proper sig-

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nals for night service ; and it was the evidence of this omission or failure to protect the locomotive while standing that was depended upon by plaintiff's counsel as warranting a verdict against the receivers. So the charge of the court upon this branch of the evidence was quite full and complete, reference being made to the rules we have mentioned. Among other things, the court charged as follows : "The negligence which the plaintiff claims to have existed is said to have consisted in violating the rules which have been offered in evidence. * * * The violation of these rules, when attended by a wrong, constitutes the fact of admission of negligence on the part of those who violate them. The rules are designed for a wise and beneficent purpose, to transact the business of the railway efficiently, and to protect its employees and passengers, carried by and over its lines, against personal injury. The violation of a definite, well-understood rule on the part of these defendants may be considered by the jury as evidence of negligence, and from the violation of these rules—well understood by the persons who violated them—(if the jury should find from the testimony that such was the fact that there was this violation) *the jury may consider negligence on the part of the defendants established.*" And to that part of this language which we have italicized counsel for the defendant receivers took an exception, and now assign it as error. The instruction was clearly wrong. Here were private rules adopted for the government of trains and trainmen while using these tracks. They did not stand on the same footing as statutes or municipal ordinances in the nature of police regulations for the protection of the public or some particular class of persons. The law, statutory or municipal, if valid, fixes the legal standard of duty to those for whose protection it is designed, while private rules may require either more or less than is required by law. So, compliance with private rules would not necessarily constitute reason-

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able care, nor a violation thereof necessarily constitute negligence. By this instruction it was declared as a matter of law that, if the employees in charge of this locomotive failed to obey the rule we have quoted by neglecting to promptly put out flags, lamps, fusees, or torpedoes, if there was danger of being overtaken, the receivers' negligence was established. The charge really went further than this, for upon the trial it was claimed by plaintiff's counsel that other rules, introduced in evidence and equally as definite and well understood, were also violated when the locomotive was allowed to stand upon the main track. This instruction, in the form in which it was given, invaded the province of the jury and determined facts. The employees' disregard of the rule, or their failure to give and use such of the signals as would have served as notice or warning of danger in the darkness which prevailed at that time of night, might have been considered by the jury as evidence of negligence, but proof of a failure to observe the rules could not, of itself, establish defendants' negligence at the time of the collision. By this part of the charge the rules adopted for the government of all employees using these tracks were held to be a test for defendants' negligence, and to be the legal standard by which the fact of such negligence should be determined. But, in this case, the error was without prejudice, because, on the undisputed evidence, the court would have been warranted in instructing the jury, as a matter of law, that those in charge of defendants' engine were guilty of negligence in failing to give warning to others when they stopped upon the track. They were on a main track over which more than 100 trains passed each day, part of these on time cards, but many that were not. Trains or engines could be expected almost any moment. Adjacent to these main tracks, for there were two, were parallel tracks used for freight trains, with numerous "cross-overs" to the main tracks, which were in constant use. It was after dark, and those in charge

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knew that a belated engine—the one on which plaintiff was fireman—might arrive any moment from the roundhouse, less than three miles back, and that it would undoubtedly be running rapidly, in order to make up for its lost time. It does not appear how long defendants' locomotive had been halted at this unusual place when the collision occurred, but it was shown that the belated locomotive did not start from the roundhouse until 15 or 20 minutes after the other had departed, and it also appeared that immediately after the accident the dog was found tied in the caboose upon one of the yard tracks. Evidently the halt had been long enough to transfer the dog from the engine to the caboose. The only warning given was that afforded by the single red light upon the rear of the tender, and that would not indicate whether the locomotive was under motion or standing still. With an unobstructed view of the track to the rear for half a mile, and a perfect opportunity to see the approaching headlight upon the other engine for that distance, at least, defendants' employees did not even take the precaution to guard against a rear-end collision by swinging a lantern,—a thing that could have been done immediately upon the stopping of their locomotive. They put out no signal and gave no warning of their dangerous act, and upon the trial offered no evidence to explain or rebut that produced by plaintiff. We are justified in holding that the proofs conclusively established defendants' negligence, and that the court below would have been warranted in so charging as a matter of law and irrespective of the rules. Therefore the instruction in question was error without prejudice.

There are but one or two points made by counsel, in addition to those already discussed, which need consideration. If, as claimed, the engineer in charge of the locomotive on which plaintiff was firing ran it negligently,—that is, too rapidly,—and in disregard of some of the rules we have mentioned, his negligent conduct could not be imputed to plaintiff. The immediate proximate cause of plaintiff's injuries was the

Note

negligence of the men operating the head engine. Nor were the trainmen upon those two locomotives serving a common master, and therefore fellow servants. Although running over a terminal track, under rules put in force by the owner of such track, a third party, these men owed the duty of obeying these rules to their respective masters, not to the third party. A disobedience of the rules was a violation of the duty due from a servant to the party who employed him, and none of these men were in the employ or under the control of the terminal company. We shall waste no time in discussing the contention of counsel for defendants that their clients cannot be held because the act producing the injury—stopping the engine to unload the dog—was wholly without the scope of the servants' authority. The judgment is affirmed.

NOTE.

Negligence—Evidence—Admissibility of Company's Rules.—There is no error in admitting in evidence the rules of a company, the same being relevant to the negligence charged in the declaration. *Chatanooga, R. & C. R. Co. v. Whitehead*, 90 Ga. 47, 15 S. E. Rep. 629. *Louisville & N. R. Co. v. Orr*, 94 Ala. 602, 10 So. Rep. 167; *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 12 So. Rep. 276; *Riley v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 385; *Dugan v. Chicago, St. P., M. & O. R. Co.*, 85 Wis. 609, 55 N. W. Rep. 894.

Where an employee sues for a personal injury, and the company defends on the ground that the injury resulted from the negligence of the engineer of the train, who was a fellow-servant with the plaintiff, the latter may prove a rule of the company to either discharge, suspend, or reprimand employees who have been guilty of negligence, which had not been enforced as to the engineer in question. *Atchison, T. & S. F. R. Co. v. Parker*, 55 Fed. Rep. 595.

The allegations of negligence were that defendant, by its servants, carelessly and improperly drove and managed its locomotive, and that defendant was negligent in not providing proper and suitable platforms and railings at the crossing or point where the injury was inflicted. Plaintiff gave in evidence a rule of defendant for the regulation of trains and engines at stations and street crossings. *Held*, that the rule was properly admitted, not for the purpose of founding a substantive cause of action upon its breach, but as tending, with other evidence, to show negligence in driving and managing the engine which inflicted the injury; *Lake Shore & M. S. R. Co. v. Ward*, 135 Ill. 511, 26 N. E. Rep. 520; *affirming* 35 Ill. App. 423.

Evidence of the rule of the railroad company, No. 83, which is a

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prohibition against making "running switches," was properly admitted, against defendant's objection, where plaintiff offered to follow it up by the introduction of proof showing that, at the time when the injury occurred, the agents of defendant were making a "running switch;" *Baltimore & O. R. Co. v. Kean*, 28 Am. & Eng. R. Cas. 580, 65 Md. 394, 5 Atl. Rep. 325.

On the trial of an action on the case to recover damages sustained by a passenger through the alleged fault of the servants of the defendant corporation, it was claimed that the fault consisted in whole or in part of the violation of the established rules of the company. *Held*, that a book containing the rules and regulations of the company, and intended for the use of their employees to direct them in the discharge of their duties, was admissible in evidence. *Hobbs v. Eastern R. Co.*, 66 Me. 572, 19 Am. Ry. Rep. 210.

NASHVILLE, C. & ST. L. RY. CO.

*v.*MATTINGLY *et al.**(Court of Appeals of Kentucky, April 30, 1897.)*

Actions against Railroad Companies—Locality of Service.*—An action against a railroad company on a contract of shipment may be properly brought in the county where the contract was made, and in such action service of process may be upon an agent of the company living in another county.

Suit to Enjoin the Collection of Judgment.—That the testimony failed to sustain the averments of the petition is not a sufficient reason for adjudging a judgment void in a suit to enjoin the collection thereof.

APPEAL from Marion county circuit court. *Affirmed.*

H. P. Cooper, for appellant.

H. W. Rives, for appellees.

GUFFY, J. The appellant instituted this action in the Marion circuit court to perpetually enjoin the collection of a judgment obtained by appellees against appellant for \$95, with some interest, and \$18.30 costs. The court below, on motion of appellees, dissolved the injunction, and also dismissed the petition, and from that judgment this appeal is prosecuted.

*See note at end of case.

Note

It is insisted by appellant that the petition and affidavit were not insufficient, hence the motion to dissolve ought not to have prevailed. It is suggested that the copies of the other suit, etc., do not properly constitute part of the record in this case, but, as they have not been stricken from the transcript, it seems to us that they are before us; and, besides, appellant has argued that the facts show that the \$95 judgment is void, thus seeming to recognize the record as copied. It will be seen that the petition in the original action contains allegations showing that the contract of shipment was made in Marion county with the appellant, its agent, or partner, and, that being true, the Marion circuit court had jurisdiction of the cause of action, and service of process on appellant's agent in Fulton county gave the court jurisdiction of the appellant, as was expressly decided in case of *This Appellant v. Carrico*, 95 Ky. 489, 26 S. W. 177. It may be true, as argued by counsel, that the testimony failed to sustain the averments of the petition, but we cannot, for that reason, adjudge the judgment void in this action, to enjoin the collection thereof. Judgment affirmed.

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Railroad Compa-
nies—Locality of
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NOTE.

Suits Against Corporations—Locality of Service.—The locality of suits against corporations is usually provided by statute; and in connection with this it is often required that service of process shall be made upon some officer or agent within the county where the suit is brought, or where the principal officer of the corporation is located, etc. The *Virginia* statute concerning service of process on corporations is particularly explicit in this regard. See 13 Va. L. J. 741-776 (*Virginia* statute discussed in article by W. M. Lille); 1 Minor's Insts. (3d Ed.) 564, *et seq.*; *Virginia* Code (1887), § 3225 *et seq.*

By the *Michigan* statute a corporation officer may be served in any county of the State. See *Potter v. John Hutchinson Mfg. Co.* (Mich. 1890), 44 N. W. Rep. 595. But in *West Virginia* it is held that the president can only be served in the county in which he resides, and return must show service in such county. *Taylor v. Ohio River R. Co.*, 35 W. Va. 328.

Other instances of such requirements are seen in *Dewey v. Central Car, etc., Co.*, 42 Mich. 399; *People v. Judge*, 23 Mich. 492; *Haywood*

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v. Johnson, 41 Mich. 601; *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 9 Am. & Eng. R. Cas. 59, 40 Am. Rep. 808 (service must be in county where suit is brought); *Ætna Ins. Co. v. Black*, 80 Ind. 513; *Mitchell v. Southwestern R. Co.*, 75 Ga. 398; *Kansas City, etc., R. Co. v. Daughtry*, 88 Tenn. 721; *affirmed*, 138 U. S. 298; *Cairo, etc., R. Co. v. Joiner*, 72 Ill. 520; *Western Union Tel. Co. v. Conant*, 11 Colo. 111; *Com. v. New York, etc., R. Co.*, 7 Pa. Co. Ct. Rep. 407; *Smith, etc., Co. v. Morse Woolen Scouring Co.* 10 Pa. Co. Ct. Rep. 624; *National Starch Co. v. Morse Woolen Scouring Co.*, 11 Pa. Co. Ct. Rep. 192. *Wagn. Mo. St.* 294, § 26, provides for an enlargement and extension of service by issuing process to a different county from where the suit is brought, when the officers of the company do not reside there. *Mikle v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 145.

Since the passage of the Act of Congress of March 3, 1887, providing, *inter alia*, that receivers may be sued without leave of court, process against the receiver of a railroad may be by service upon the clerk or any station agent upon the road. *Procter v. Missouri, K. & T. R. Co.*, 142 Mo. App. 124.

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(17 Wash. Rep. 582.)

Death by Wrongful Act—Negligence—Pleading.—Where, in an action to recover for the death of an employee killed in a derailment, the complaint alleges negligence in that a safe road-bed was not provided and that the road-bed and track were, and were allowed to become and remain, out of repair, it was not error to give an instruction submitting to the jury the condition of the road-bed at a certain place, although there was no allegation of negligence based on the condition of the track at such point.

Assumption of Risk—Evidence—Sufficiency.—In such action where the only proof that deceased had knowledge of the defective condition of the road-bed was that he had been over it on his engine a few times, it was not error to fail to give an instruction that assumption of risk from such defects was an element of the case.

Same—Pleading.—On appeal in such action where the case was not presented to the trial court on the theory of assumption of risk, the case will not be considered upon that theory. Assumption of risk is a defense to be pleaded and proved.

Duty of Master—Question for Jury.—It is for the jury to say what precautions a prudent employer must use to protect his employee.

Negligence—Evidence—Sufficiency.—In such action it was not error to refuse to direct a verdict for the defendant where it ap-

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peared that the ties at the place of the accident were entirely rotten and so decayed that the spikes easily slipped out, allowing the rails to spread, and where there was evidence that the defective condition of that part of the road-bed had been reported to the section foreman three months before the accident.

Special Interrogatory—Refusal to Submit.—The submission of special interrogatories is in the discretion of the trial court, and a refusal to submit cannot be regarded as error.

Death by Wrongful Act—Damages—Elements of Recovery.*—Under sec. 138, 2 Hill's Code (Wash.), the jury may, in estimating damages in such action, consider the social and domestic relations of deceased and his family, his daily services, attention and care, his intellectual, moral and physical training of his children, but cannot allow damages by way of solace to the affections of his family nor for their grief and anguish.

Excessive Verdict.—In such action a verdict for \$40,000 was excessive, where it appeared that deceased was sober, industrious and of good business ability, was earning \$150 per month, and had an average expectancy of life of 38 years.

APPEAL from Columbia county superior court.
Affirmed.

Cox, Cotton, Teal & Minor, for appellant.

A. S. Bennett, and *Will H. Fouts*, for respondents.

REAVIS, J. Action by the widow and two minor children of Robert Walker, deceased, respondents, against McNeill, receiver of the Oregon Railway & Navigation Company, appellant, Case Stated. to recover damages for the death of the decedent by negligent act of appellant.

On the 22d of December, 1894, Robert Walker, respondents' decedent, who was then an engineer in the employ of appellant, was ordered by appellant to take a heavy helper engine to assist one of appellant's passenger trains up the hill from Bolles Junction to Alto. This engine was heavier than was usually employed in the passenger service, although not the heaviest one on the road. It was ordinarily used in helping freight trains up the hill, and it does not appear whether it had been used before upon a passenger train. At this time the passenger train was unusually heavy and Walker was directed to assist it with his engine. For some distance from Bolles Junction in the direction of

*See notes at end of case.

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Alto there is an up grade, and the grade then drops down for a short distance. It was upon the down grade at a point on a reverse curve where the railroad emerges from a small cut and passes to a fill that the wreck occurred which caused the death of Walker. The train was running at the usual speed which was required—from twenty to twenty-five miles a hour. Walker's engine, as well as the regular engine attached to the train, and the baggage car were thrown down the embankment. The fireman on Walker's engine, the men on the other engine, and the baggagemen jumped from their places and escaped with more or less injury. Walker remained at his post to put on the air and reverse the engine. He was thrown over the bank with his engine and killed. The passenger cars were not thrown from the track. At the time of his death Walker was twenty-five years of age, was in good health, sober, industrious, a kind and affectionate husband and father and a good business manager. One of the children at that time was about two years old and the other was born a few months after his death.

The material allegations of the complaint which are on review here are as follows :

"That the said defendant carelessly and negligently failed to provide a safe road-bed for said Walker to pass over in so doing, and carelessly and negligently failed to provide him with a safe and suitable engine with which to do said work; but, on the contrary, carelessly and negligently permitted the grades and curves upon said road, and especially the fills and embankments thereon, to be and to remain too narrow and otherwise of an improper construction, so as to make the same likely to give way, and permit the ties and rails to give with a heavy load, and also permitted said road to become and remain out of repair, and permitted the ties upon which the rails rested to become rotten and loose, so that said road was grossly and unnecessarily dangerous and unsafe.

"That said defendant further carelessly and negligently ordered said Walker to go over said road with

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an engine and train which was too heavy for the road and for the character of the fills and embankments thereon, and also permitted the engine upon which said Walker was sent out, and which he was directed to take, to be and remain out of line and untrue, and out of level upon its wheels, and generally unsafe and out of repair.

"That on said date and while said Walker was passing over said road from Bolles Junction to Alto, with and upon said engine, under orders of defendant, as aforesaid, at a point between said stations where there is a curve in said road, and a high fill thereon, the engine, which he was taking and upon which he was riding as aforesaid, left the track by reason and on account of the general bad condition of the road, and the rotten and loose condition of the ties as aforesaid, and by reason and on account of the narrow and improper construction of said fill and curve, and by reason and on account of the said engine being out of repair, and too heavy for the road as aforesaid, and rolled down the embankment, with and upon said Walker, thereby inflicting upon him great bodily injury, causing his death immediately thereafter.

"That at the time of said occurrence, and previous thereto, the said Walker was a man of sober and industrious habits, good health and good ability as a manager of property and affairs, and was a skillful engineer, and able to earn high wages in such capacity; that in addition thereto he was a prudent, kind and affectionate husband and father and that the plaintiffs were each and all dependent upon him for support, education and maintenance.

"That by reason of the careless and negligent acts and omissions of the defendant, causing the death of said Walker hereinbefore set forth, the plaintiffs have lost his earnings and accumulations, and his foresight and management, and have also been deprived of his support, maintenance, comfort and society, and his advice, counsel and oversight as a husband and parent, and are and have been damaged thereby, etc."

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Appellant moved to strike from the complaint the allegations relating to the damages suffered by plaintiffs, as follows: First, the words "that in addition thereto he was a prudent, kind and affectionate husband and father;" second, the word "comfort" following the word "maintenance" and preceding the word "and;" third, "and his advice, counsel and oversight as a husband and parent." This motion was overruled and an exception taken by appellant.

The superior court instructed the jury:

"1. It is the duty of the railroad company to see that due and reasonable care is used in the inspection of its road bed, ascertaining its condition and in keeping it in repair.

"II. If therefore you find from the evidence that the road bed, at the place of injury, was out of repair, and the ties rotten, and that this bad repair and rotten condition of the ties caused the injury, and if you further find that the receiver of the railroad company, or his agents in charge of the track department of the road, knew of the bad condition of the track, or could have ascertained its bad condition by a reasonably careful inspection long enough prior to the accident to have repaired the same, and if they were negligent and careless in failing to inspect the road, or in failing to inspect the same, and that negligence and carelessness caused the injury, without fault or negligence on the part of Robert Walker, then the plaintiffs can recover.

"III. It is the duty of the railroad company, or its receiver, to keep its track in repair, so that it is safe for the kind of engines and rolling stock that it sends over it, so far as reasonable care and prudence will make it so.

"IV. Therefore if you should find that the track in question was unsafe for an engine, such as the one that Walker was riding upon at the time of his death, the fact that the track would have been safe for lighter engines of different construction, would not necessarily be a defense."

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Appellant assigns the giving of each of the above instructions as error. The court also gave the following instruction upon the measure of damages :

"II. While you should not allow the plaintiffs anything for the mere loss of the society of the deceased, yet you have a right to take into consideration, not only his earning capacity, but also the care and attention which such a man would give to his wife and children, and also the loss of his advice and training as a husband and father, which they have suffered by his death. In other words, the plaintiffs are entitled to be compensated for the substantial and material benefits which they would have received from the deceased if he had lived, and which they have lost by reason of his death. And that includes whatever support they would have received from him, and the net earnings which he would have earned and ultimately applied to their benefit, and the loss of his care, training and advice as a husband and father."

To which an exception was taken.

Appellant requested an instruction to the jury to return a verdict for appellant, which was denied. The jury returned a verdict for respondents and assessed the damages at \$40,000. After motion for a new trial made by appellant and overruled by the court, judgment was duly entered upon the verdict.

1. The learned counsel for appellant maintain that the complaint contains no allegation of negligence based upon the condition of the track in the cut, and the court erred in submitting such condition to the consideration of the jury. It will be observed that the charge in the complaint is that appellant carelessly and negligently failed to provide a safe road-bed, and a safe and suitable engine with which to do the work, but, on the contrary, carelessly and negligently permitted the grades and the curves in the road, and especially the fills and embankments thereon, to be and remain too narrow, and also permitted the road to become and remain out of repair and permitted the ties on which the rails

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rested to become rotten and loose, so that the road was unnecessarily dangerous and unsafe.

While it might be interesting to review the able argument of counsel in the verbal criticism of the language employed in the complaint, it would extend the limits of this opinion too far. The negligence here charged consists of two elements; failure to provide a safe road, with specification of the delinquency in particulars, to wit: the grades and curves, the fills and embankments, were permitted to be and remain too narrow and of improper construction, so as to make them likely to give way and to allow the ties and rails to give with a heavy load; and again, the road was allowed to become and remain out of repair, *i. e.*, the ties on which the rails rested were rotten and loose; and that the engine was unsafe to do the work—that it was too heavy for the road and for the character of fills and embankments.

We think the objection to the complaint untenable; but if it be conceded that the allegations of negligence in the complaint were confined to the fill, and the train had been derailed in the cut instead of on the fill, the variance would be too slight for serious consideration under our Code of Procedure.

"Sec. 217. No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just."

Bliss on Code Pleading. (2d Ed.) §310a, says:

"As to the allegation of negligence. The circumstances which excuse certainty, furnish additional reason why the pleader should not be required to give the specific acts or omissions which constitute negligence. The sufferer may only know the general, the

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immediate cause of the injury, and if it be an occurrence that usually results from negligence, the opposite party must explain it and show due care."

The appellant in his answer, after a denial of negligence and of the material allegations of the complaint, set up as an affirmative defense contributory negligence on the part of respondents' decedent, and also assumption of risk of the employment, and maintains that the second instruction Assumption of Risk—Evidence—Sufficiency. given by the court did not include as an element for the consideration of the jury the assumption of risk of employment by the deceased, while purporting to state each element of the case. The testimony at the trial discloses that the deceased engineer had been over the particular portion of the road where the fatal accident occurred some eight times. No further proof of knowledge of the defects existing in the road-bed are shown than the fact that the engineer had thus been over the road a few times with freight trains. It does not appear from the record before us that this was a question relied upon by counsel in the trial below, and we do not think there is evidence sufficient to warrant an instruction upon this defense. The sixth instruction, given at the request of appellant, is as follows:

"In order that the plaintiffs may recover, you should be satisfied from the evidence—First: That some one or more of the defects in the road or track alleged in the complaint actually existed. Second: That such defects were such as a reasonably prudent man in the exercise of ordinary care would not allow to exist. Third: That Walker's injuries resulted from such defects. Fourth: That the defendant knew of such defects or, in the exercise of ordinary care should have known of them. If the evidence fails to satisfy you upon any of the four points above mentioned you cannot find for the plaintiffs, but must find for the defendant."

It would be at variance with the view often expressed by this court to consider a cause brought here upon

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another or different theory than that presented to the trial court. It has already been determined that contributory negligence is a defense to be pleaded and proven in this state. We view assumption of the risk of employment as of kindred nature. The better authorities seem to favor this rule; and it is certainly on principle the natural and orderly method of pleading and proof.

The appellant also insists that the third and fourth instructions do not state the law. Reasonable care has reference to all the circumstances and conditions surrounding the railroad and its operation, the amount of traffic, the expense attending the precautions which should be used, and the purpose of the road; and many other considerations enter into the question. All this is for the jury, and from the testimony, ordinarily, in each case the jury must determine what precautions a reasonable, prudent employer must use.

The court said in *Johnson v. Bellingham Bay Improvement Co.*, 13 Wash. 455 (43 Pac. 370):

"It is an elementary proposition which does not call for citations of authority, that the master must furnish a safe place in which he requires his servants to work, and that he must furnish them safe appliances. He is, of course, not bound to insure the employee, but he is bound to use reasonable care in the selection and construction of the machinery and the appliances."

2. The evidence in the record discloses that perhaps five out of six of the ties on the road-bed of appellant in both cut and fill, along where the accident occurred were rotten, that they were a mere shell, and that where the derailed car-wheels touched them they broke in two, that they were so decayed that the spikes holding the rails upon the ties were loose and easily slipped out and that the rails spread. Here was sufficient cause for the accident. No other cause of the accident than the bad condition of the road-bed was shown or intimated at the trial. Whenever a car or train leaves the track it

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proves that either the track or machinery or some portion thereof is not in a proper condition, or that the machinery is not properly operated. *Edgerton v. New York & Harlem R. R. Co.*, 39 N. Y. 227; *Seybolt v. New York, etc., R. R. Co.*, 95 N. Y. 568 (47 Am. Rep. 75).

There was testimony introduced by the respondents tending to prove that a large proportion of the ties extending all the way from where the first indications of any of the wheels having left the rails appear to the place where the engine actually left the track and went into the ditch were so rotten as to be practically worthless for the purpose of holding the track in place against any considerable pressure. There was also evidence given by an employee of the defendant that he had gone over this defective road some three months before and had reported its bad condition to the section foreman of defendant, who was in control of that portion of the track. It is apparent that the court properly overruled the request for a verdict for defendant.

It is also complained that the court refused to submit the following interrogatories to the jury upon request of appellant: "Where was the train, or any portion of it, first derailed?" "Was such derailment the cause of the overturning of the engine?"

Special Interrogatories - Refusal to Submit.

The form of these interrogatories is open to criticism. The first one required the jury to point out the exact place where the train or any portion of it was first derailed. Possibly the jury could not tell. It does not seem to be necessary in order to find upon the main question of negligence. The second one seems to ask what obviously appeared, *i. e.*, that the derailment of the train caused the overturning of the engine. But it has been held in this court that the submission of special interrogatories under the code is entirely in the discretion of the trial court, and the refusal to submit cannot be regarded as error. *Pencil v. Home Ins. Co.* 3 Wash. 485 (28 Pac. 1108); *Bailey v. Tacoma Traction Co.*, 16 Wash. 48 (47 Pac. 241).

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The most serious question for consideration is the amount of damages assessed by the jury, and under this phase of the case the motion of appellant to strike from the complaint will be considered without specially further referring to it. Sec. 138, 2 Hill's Code, states the rule for damages for death caused by the wrongful act or negligence of another as follows:

Death by Wrongful Act—Damages—Elements of Recovery.

"In every such action the jury may give such damages, pecuniary or exemplary, as under all circumstances of the case may to them seem just."

This is a very liberal rule, and while the damages must be pecuniary in this case, they do not exclude a consideration of the social and domestic relations of the parties or their kindly demeanor towards each other. They are a part of all the circumstances of the case. *Beeson v. Green Mt. G. M. Co.*, 57 Cal. 20.

But damages by way of solace to the affections of a wife or children cannot be allowed. *Tiffany on Death by Wrongful Act*, § 160, observes:

"It seems that the pecuniary value of the support of the head of the family cannot be limited to the amount of his wages earned for the benefit of his family, but that his daily services, attention, and care on their behalf may be considered."

And at § 162:

"The damages for loss of support suffered by a minor child include the loss of such comforts, conveniences, and also of such education as the parent might have been expected to bestow upon him." 3 *Sutherland, Damages* (1st Ed.) 282-284; *Tilley v. Hudson River R. Co.*, 29 N. Y. 252 (86 Am. Dec. 297); *Stoher v. Ry. Co.*, 91 Mo. 509 (4 S. W. 389).

The word "Pecuniary" is not construed here in a strict sense. It will not exclude the loss of nurture, of the intellectual, moral and physical training which only a parent can give to children, nor is the same certainty of loss required to be established as in ordinary actions. The damages are largely prospective and their determination submitted to the just discretion of

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juries upon very meager and uncertain data. That deceased was a prudent, kind and affectionate husband and father was a matter properly for the consideration of the jury in estimation of the value of his life to respondents. The material comfort, the value of counsel to the inexperienced child, is to be taken into consideration. It is difficult to purchase this with money. It is received knowledge, accepted by all men that the element of affectionate loyalty in the mere servant is of pecuniary value. Of two servants hired for money and equal in capacity, interest, industry and conscientious fidelity to trust, one may be the more valuable because of a warm and affectionate personal regard for his master. It opens the eye and quickens the service when affection aids its rendition. "What man is there of you who if his son ask bread will he give him a stone?" Thus the service of a kind and affectionate father will certainly be rendered. It is the certainty which affection gives to this service that adds the element of pecuniary value; it could never be such offices as are performed by the mere "eye servant."

The court properly instructed the jury, if they found for respondents they should then determine the amount of their damages. These damages consist of pecuniary loss suffered by them, and the jury cannot allow anything as a solace for the grief and anguish of the plaintiffs or any of them. The deceased engineer was earning at the time of his death \$150 per month, was sober, industrious, and a man of good business ability. He had an average expectancy of life of thirty eight years. In *Sears v. Seattle, etc., St. Ry. Co.*, 6 Wash. 227 (33 Pac. 389, 1081), a verdict of \$15,000 was upheld in an action for injuries due to defendant's negligence where the plaintiff was a strong, healthy woman of the age of thirty years, and industrious, and had been earning \$50 per month in addition to looking after household duties. In *Roth v. Union Depot Co.*, 13 Wash. 525 (43 Pac. 641), a verdict for \$15,000 was sustained for injuries to a child of nine years of age necessitating the amputation of one of his legs.

Excessive Verdict.

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A jury composed of persons of discretion ordinarily embracing individuals of different occupations and varied experience is to bring its practical judgment to the consideration and settlement of the damages from the loss of the husband and father in the light of all the circumstances surrounding the case, and courts should be reluctant to interfere with its conclusion when fairly made. But the rule has heretofore been established in this court that if, upon the whole case, it is thought the damages are excessive, they may be reduced by the court.

We have concluded after the most careful review of the present cause that a judgment in favor of the respondents and against the appellant for \$25,000 should be approved; and under the practice heretofore adopted, the respondents are allowed thirty days in which they may remit the excess of \$15,000 in the verdict awarded by the jury, and upon such remission being filed in court, the judgment will in all things be affirmed. But if no remission of the excess shall be made by respondents then the judgment is reversed and a new trial ordered.

SCOTT, C. J., and ANDERS and GORDON, JJ., concur.

NOTES.

Death by Wrongful Act—Damages—Elements of Recovery for Death of Husband and Parent.—The damages in such a case must be sufficient to compensate for the pecuniary loss which the decedent's wife or children, or both, have sustained in consequence of his death, and this is such a sum, and no more, as the deceased would probably have earned by his intellectual and bodily labor at his business, profession, or trade during the residue of his probable life, which would have gone for the benefit of his wife and children. In estimating this, the decedent's age, business capacity, ability and disposition to labor, and his habits of living, are to be considered.

United States.—In *Harkins v. Pullman Palace Car Co.*, 52 Fed. Rep. 724, which was an action by a wife to recover for the death of her husband, it appeared that he was a laborer and was earning four hundred dollars a year. The defendant insisted that in no event could the recovery exceed a sum which, when invested, would yield an annual income of two hundred dollars, one-half of the husband's annual earnings, that being the proportion she might fairly expect to receive from his earnings. But the court held that such a

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basis of calculation was too narrow; that the life of an honest, industrious, and kind-hearted husband, had, for the wife, a money value in addition to his actual earnings.

Alabama.—In an action brought by the widow as administratrix of her deceased husband, it appeared that she was the only member of his family, and that the deceased had been earning one dollar a day and he "always carried it home and spent it on his family." The deceased was forty years old when killed. It was held that the recovery should be for such a sum as, at legal interest, would give the widow one hundred and fifty dollars a year for twenty-seven years (the probable duration of her life), and exhaust the principal at the end of that time; in other words, such a sum as would purchase a twenty-seven-year annuity of one hundred and fifty dollars. Louisville, etc., Co. v. Trammel, 93 Ala. 350. Compare *Harkins v. Pullman Palace Car Co.*, 52 Fed. Rep. 724.

Arkansas.—St. Louis, etc., R. Co. v. Needham, 52 Fed. Rep. 371, 54 Am. & Eng. R. Cas. 88, 10 U. S. App. 339.

California.—In estimating the damages to be recovered by the children for the death of the father, the widow having died before action brought, it is not proper to estimate what the widow and children would be entitled to and then deduct from this the sum to which the widow would have been entitled had she lived. The fact that the deceased left a widow surviving should be disregarded. Taylor v. Western Pac. R. Co., 45 Cal. 323.

Colorado.—Hayes v. Williams, 17 Colo. 475.

Georgia.—David v. Southwestern R. Co., 41 Ga. 223; Atlanta, etc., R. Co. v. Venable, 67 Ga. 697. In this latter case it was held that, the measure of damages being the support of the child until his majority, the damages should be reckoned from the time of the death and not from the time of the injury.

In an action, under Irwin's Ga. Code, § 2920, by a widow for the death of her husband, the rule of damages was declared to be the actual pecuniary damage sustained by her, and this must be ascertained by inquiring what would be a reasonable support for the wife, considering the habits, prospects, and occupation of the husband. The loss to the children could not be considered. Macon, etc., R. Co. v. Johnson, 38 Ga. 409.

The widow's loss of her husband's companionship cannot be considered. Georgia R. Co. v. Pittman, 73 Ga. 325, 26 Am. & Eng. R. Cas. 474.

The widow is entitled, under the Code of 1882, § 2971, to recover the full value of her deceased husband's life. The burden is upon her to prove the damages, however, and a necessary element of the proof is as to the number of years the deceased would probably have lived. If there is no proof on this subject, the plaintiff fails to prove her case and judgment should be given for the defendant. Savannah, etc., R. Co. v. Stewart, 71 Ga. 427. See also Central R. Co. v. Rouse, 77 Ga. 393, 80 Ga. 442 (proper charge to the jury stated); Savannah, etc., R. Co. v. Flannagan, 82 Ga. 579, 14 Am. St. Rep. 183, 39 Am. & Eng. R. Cas. 661; Central R., etc., Co. v. Roach, 64 Ga. 635, 8 Am. & Eng. R. Cas. 79.

Illinois.—The support the widow would probably have received from her husband is the controlling element in arriving at the pecuniary damages sustained by her in his death. Illinois Cent. R. Co. v. Baches, 55 Ill. 379, 1 Am. Ry. Rep. 585.

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Indiana.—The widow and children may recover not only for the loss of support the deceased furnished them, but also for what he would probably have accumulated if he had lived out his expectancy of life. *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168.

Kentucky.—"The power [of decedent] to earn money had he lived, not exceeding the amount claimed," is a proper criterion. *Cincinnati, etc., R. Co. v. Sampson*, 97 Ky. 65.

Louisiana.—See *Herman v. New Orleans, etc., R. Co.*, 11 La. Ann. 5.

Maryland.—*Baltimore, etc., R. Co. v. State*, 60 Md. 449, 12 Am. & Eng. R. Cas. 155. In this case, the court, by ALVEY, J., said, *inter alia*: "Thus the children may recover for the loss of the education, comforts, and position in society which they would have enjoyed if their father had lived and retained the income which died with him, and they had continued to form part of his family," citing *Pym v. Great Northern R. Co.*, 2 B. & S. 759, 110 E. C. L. 759; *Mayne on Dam.*, § 707.

In another case, which was an action for the death of a woman, it appeared that the damages, if any, would go to the married daughter and two sons of the deceased, all above the age of twenty-one. The deceased made her home with the daughter and did the housework, and thus enabled the daughter to work out and earn six dollars a week, which she was unable to do after her mother's death. The deceased was in the habit of nursing the sick members of her sons' families, but there was no evidence to show what was the value of her service nor that the sons were obliged afterwards to employ a nurse. It was held that the daughter was entitled to recover, she having shown an expectation of pecuniary benefit from the continuance of her mother's life; but the sons were not entitled to recover anything, no pecuniary damage to them being shown. *Baltimore, etc., R. Co. v. State*, 63 Md. 135, 21 Am. & Eng. R. Cas. 202. See also *Baltimore, etc., R. Co. v. State*, 24 Md. 271; *Baltimore, etc., R. Co. v. State*, 33 Md. 542; *Baltimore, etc., R. Co. v. State*, 41 Md. 268, 6 Am. Ry. Rep. 276.

Missouri.—*McPherson v. St. Louis, etc., R. Co.*, 97 Mo. 253; *Tetherow v. St. Joseph, etc., R. Co.*, 98 Mo. 74, 14 Am. St. 617; *Fugler v. Bothe*, 43 Mo. App. 44. See also *McGowan v. St. Louis Ore, etc., Co.*, 109 Mo. 518; *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.

But nothing can be allowed to the widow for the loss of the companionship of her husband. *Schaub v. Hannibal, etc., R. Co.*, 106 Mo. 74.

Montana.—*Soyer v. Great Falls Water Co.*, 15 Mont. 1.

Pennsylvania.—*Boyd v. Hutchinson*, 18 Phila. (Pa.) 283; *Pennsylvania Tel. Co. v. Varnan*, (Pa. 1888) 15 Atl. Rep. 624.

The value of the husband's life to the wife is determined by ascertaining how much better off pecuniarily she was with him than she is without him. *Catawissa R. Co. v. Armstrong*, 52 Pa. St. 282.

Tennessee.—The original rule was that the widow might recover for the pain and suffering of her husband, the necessary expenses incurred in consequence of the injury and death, and the pecuniary loss resulting to the parties entitled to the benefits of the recovery from the wrongful death. *Collins v. East Tennessee, etc., R. Co.*, 9 Heisk. (Tenn.) 841, 20 Am. Ry. Rep. 46; *East Tennessee, etc., R. Co. v. Mitchell*, 11 Heisk. (Tenn.) 400. The whole doctrine, however, was a subject of doubt, and the court finally removed all question

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by holding that the widow and children could recover only such damages as the deceased himself might have recovered had he lived and brought the action himself. *East Tennessee, etc., R. Co. v. Toppins*, 10 Lea (Tenn.) 66, 11 Am. & Eng. R. Cas. 222.

Since the decision just cited the statute of 1883 (M. & V. Code, § 3134) has been passed, expressly providing that, in addition to the damages which the deceased himself might have recovered, the widow and children may recover all damages sustained by them. The present rule is therefore in accord with the general rule which we stated above. See *Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173, 59 Am. & Eng. R. Cas. 463.

Texas.—Gulf, etc., R. Co. v. Southwick, (Tex. Civ. App. 1895) 30 S. W. Rep. 592; Missouri, etc., R. Co. v. Hines, (Tex. Civ. App. 1897) 40 S. W. Rep. 152.

In an action by a minor child for the death of his father, the measure of damages is "what he could reasonably expect to have received from the father during the probable duration of his [the father's] life." It is error to admit testimony as to the cost of rearing a child in the county of the plaintiff's residence, since that has nothing to do with the measure of damages in such a case. *International, etc., R. Co. v. Cuehn*, 2 Tex. Civ. App. 210.

Wisconsin.—Tuteur v. Chicago, etc., R. Co., 77 Wis. 505.

In an action brought under Wis. Rev. Stat., §§ 422-526, for the death of the plaintiff's intestate, if the deceased left a widow the damages recoverable are only those sustained by her alone, and are confined to the pecuniary loss. *Schadewald v. Milwaukee, etc., R. Co.*, 55 Wis. 569. She is not entitled to recover what her husband's life would have been worth to her and her children had he lived. *Liermann v. Chicago, etc., R. Co.*, 82 Wis. 286, 33 Am. St. Rep. 37.

But the fact that the children will, in consequence of the husband's death, be dependent on her for their support may be shown by the widow and must be considered in determining her pecuniary loss. *Abbot v. McCadden*, 81 Wis. 563, 29 Am. St. Rep. 910.

The jury should consider the wife's loss of protection and support and also the additions which the earnings of the husband would probably have made to his estate had he continued to live, and the reasonable expectation which the wife had of pecuniary advantage by ultimately sharing in such increase as his heir. *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 447, 21 Am. & Eng. R. Cas. 249, 64 Am. Rep. 634.

So, also, in an action for the benefit of the widow and children, the jury are not to be limited to the actual value of the support and protection of herself and the support and education of her children, but they may consider what the earnings of the deceased would have made his property worth had he lived and the reasonable expectation of the widow and children of ultimately inheriting such property. *Castello v. Landwehr*, 28 Wis. 522. See also *Potter v. Chicago, etc., R. Co.*, 21 Wis. 372, 94 Am. Dec. 548, 22 Wis. 615. Compare *St. Louis, etc., R. Co. v. Needham*, 52 Fed. Rep. 371, 54 Am. & Eng. R. Cas. 88, 10 U. S. App. 339.

Same—Same—Same—Parent's Intellectual and Moral Training of Children.—Even where the statute specifically limits the recovery to compensation for the pecuniary damages sustained, the jury, in an action for the death of a parent, may take into consideration the loss to the children of the intellectual and moral training which

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they would have had but for the death, and the loss of the care and nurture a parent ordinarily gives to a child. *St. Lawrence, etc., R. Co. v. Lett*, 11 Can. Sup. Ct. Rep. 422, 26 Am. & Eng. R. Cas. 454, *affirming* 11 Ont. App. 1, 21 Am. & Eng. R. Cas. 165; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. (Va.) 431, 17 Am. Ry. Rep. 351; *Castello v. Landwehr*, 28 Wis. 522; *McKeigue v. Janesville*, 68 Wis. 50. See also *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550; *Baltimore, etc., R. Co. v. Stanley*, 54 Ill. App. 215; *Northern Pac. R. Co. v. Freeman*, 83 Fed. Rep. 82. *Compare Walker v. Lake Shore, etc., R. Co.*, 104 Mich. 606.

"Thus, it is established that the jury may take into account, as a pecuniary loss, the deprivation of the advantages of a superior education and of social position and personal comforts of which a father's ample income would have secured the enjoyment had he lived when the income ceases with his life; and, *a fortiori*, may they regard as a pecuniary injury the loss of that provision which it may be supposed that the deceased, as a prudent husband and father, would have made for the benefit of his family, by savings from his income, when he knows the income must terminate with his life." 3 *Minor's Inst.*, p. 289, *citing Pym v. Great Northern R. Co.*, 2 B. & S. 766, 110 E. C. L. 766, 8 Jur. N. S. 819, *affirmed* in 4 B. & S. 396, 116 E. C. L. 396, 10 Jur. N. S. 199.

The correctness of the above rule "depends upon the correctness of the following propositions: (1) That the age, observation, and experience of the father fit him to assist in the physical, mental, and moral training of his child; (2) that the natural affection of father for child affords a reasonable expectation that he will render the assistance that he reasonably can toward such training; and (3) that a proper development of the physical, mental, and moral qualities of the child is of pecuniary value to him either because it must otherwise be bought or because it is an aid in money-getting in after life. It seems to us that neither of the propositions * * * can be questioned." *St. Louis, etc., R. Co. v. Maddry*, 57 Ark. 306, 58 Am. & Eng. R. Cas. 333. See the *note* following.

In an action under the *Utah* statute it is proper to instruct the jury that they may consider the benefits of association, comfort, and pleasure the family of the deceased would have received from him had his life been spared, as well as the number and ages of his children. *Chilton v. Union Pac. R. Co.*, 8 Utah 47.

In an action by a child to recover for the wrongful death of his father, his recovery is not limited to nominal damages, although there is no proof as to what the earnings of his father were, if any. The loss of a parent's care in the education and maintenance of his child have an appreciable pecuniary value which the jury has a right to consider. *Stoher v. St. Louis, etc., R. Co.*, 91 Mo. 509; *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.

Where the evidence fails to show that the deceased was fitted by nature or education to furnish his children such moral training and care, this element of damages cannot be considered by the jury.

St. Louis, etc., R. Co. v. Maddry, 57 Ark. 306; *Peoria, etc., Union R. Co. v. O'Brien*, 18 Ill. App. 28; *Illinois Cent. R. Co. v. Weldon*, 52 Ill. 290. See also *Chicago, etc., R. Co. v. Austin*, 69 Ill. 426.

So also where there is no evidence as to the value of such moral and physical training and nurture, the jury cannot consider it as an element of damages. *Walker v. Lake Shore, etc., R. Co.*, (Mich. 1897) 69 N. W. Rep. 1114.

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In *West Virginia*, where the statute limits the recovery to the "pecuniary loss," it is held proper to instruct the jury, in an action for the death of a father, that, "in estimating the pecuniary injury they [the jury] may take into consideration the nurture, instruction, and physical, moral, and intellectual training, which the children would have received from their father." *Searle v. Kanawha*, etc., R. Co., 32 W. Va. 370. See also *Stoher v. St. Louis*, etc., R. Co., 91 Mo. 509, 31 Am. & Eng. R. Cas. 229; *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471, 29 N. Y. 285, 86 Am. Dec. 297; *Dimmey v. Wheeling*, etc., R. Co., 27 W. Va. 57, 55 Am. Rep. 292.

The word "pecuniary" is to be liberally construed. *Vicksburg v. McLain*, 67 Miss. 4.

In *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287, 35 How. Pr. (N. Y.) 36, *affirming* 47 Barb. (N. Y.) 515, the court held that the "pecuniary injury," mentioned in the statute, might be such as arose from the loss of the personal care, intellectual culture, or moral training which the beneficiaries would have received had the deceased lived.

Same—Same—Solatium for Wounded Feelings.—Unless the statute expressly so provides, nothing can be allowed to the plaintiff, by way of damages, as a *solatium* to compensate him for his wounded feelings or for the mental anguish the death of his relative may have caused him, and proof of such mental suffering is not admissible on the question of damages. *England*.—*Blake v. Midland R. Co.*, 18 Q. B. 93, 83 E. C. L. 93, 16 Jur. 562, 21 L. J. Q. B. 233.

Scotland.—In *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748, it is said that while no such damages are recoverable in England, they may be recovered in Scotland.

United States.—*Barley v. Chicago*, etc., R. Co., 4 Bliss. (U. S.) 430; *Atchison*, etc., R. Co. *v. Wilson*, 48 Fed. Rep. 57, 4 U. S. App. 25; *Hall v. Galveston*, etc., R. Co., 39 Fed. Rep. 18.

Alabama.—*Louisville*, etc., R. Co. *v. Orr*, 91 Ala. 548; *Louisville*, etc., R. Co. *v. Trammel*, 93 Ala. 350; *James v. Richmond*, etc., R. Co., 92 Ala. 231, 48 Am. & Eng. R. Cas. 522.

Arkansas.—*St. Louis*, etc., R. Co. *v. Freeman*, 36 Ark. 41, 4 Am. & Eng. R. Cas. 608; *Little Rock*, etc., R. Co. *v. Barker*, 33 Ark. 350, 34 Am. Rep. 44.

California.—Nothing can be allowed as a *solatium*; loss of society can only be considered for the purpose of estimating the pecuniary loss. *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 54 Am. & Eng. R. Cas. 101; *Munroe v. Pacific Coast Dredging*, etc., Co., 84 Cal. 515, 18 Am. St. Rep. 248; *Pepper v. Southern Pac. Co.*, 105 Cal. 389.

Colorado.—*Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245.

District of Columbia.—*Bunyeau v. Metropolitan R. Co.*, 19 D. C. 76.

Georgia.—*Killian v. Augusta*, etc., R. Co., 79 Ga. 234, 11 Am. St. Rep. 410.

Illinois.—*Chicago*, etc., R. Co. *v. Harwood*, 80 Ill. 88; *Chicago*, etc., R. Co. *v. Gillam*, 27 Ill. App. 386; *Chicago*, etc., R. Co. *v. Becker*, 76 Ill. 25; *Chicago*, etc., R. Co. *v. Shannon*, 43 Ill. 338; *Cunant v. Griffin*, 48 Ill. 410; *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Chicago*, etc., R. Co. *v. Morris*, 26 Ill. 400; *Rockford*, etc., R.

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Co. v. Delaney, 82 Ill. 198, 25 Am. Rep. 308; *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379, 1 Am. Ry. Rep. 585; *Chicago, etc., R. Co. v. Ptacek*, 62 Ill. App. 375, *affirming* 171 Ill. 9.

Indiana.—*Pennsylvania Co. v. Lilly*, 73 Ind. 252, 4 Am. & Eng. R. Cas. 540. *Compare* *Howard County v. Legg*, 93 Ind. 530.

An instruction to the jury that, in estimating the damages, they may estimate not only the pecuniary loss resulting to the plaintiff from the death of her son, but may consider also such other circumstances as have injuriously affected the plaintiff in person, in her peace of mind or in her happiness, is error. *Ohio, etc., Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259.

Iowa.—*Donaleson v. Mississippi, etc., R. Co.*, 18 Iowa, 280, 87 Am. Dec. 391.

Kansas.—*Kansas Pac. R. Co. v. Cutter*, 19 Kan. 83, 17 Am. Ry. Rep. 471; *Atchison, etc., R. Co. v. Brown*, 26 Kan. 443, 6 Am. & Eng. R. Cas. 228.

Maryland.—*Baltimore, etc., Turnpike Road v. State*, 71 Md. 573; *Baltimore, etc., R. Co. v. State*, 60 Md. 449, 63 Md. 135, 21 Am. & Eng. R. Cas. 202; *State v. Baltimore, etc., R. Co.*, 24 Md. 84, 87 Am. Dec. 600.

Michigan.—See *Hyatt v. Adams*, 16 Mich. 180.

In *Mynning v. Detroit, etc., R. Co.*, 59 Mich. 257, 23 Am. & Eng. R. Cas. 320, the deceased left a wife and two children. The statute provided that the action should be brought by the personal representative and the damages distributed as personal property of the deceased; that "the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death," to those entitled to receive the damages. The trial court instructed the jury that in addition to other damages they might give "the value of his [deceased's] services in the superintendence, attention to and care of his children, and the education of his children." It was held that this instruction was error.

Minnesota.—No compensation can be allowed for wounded feeling or for the loss of the comfort and companionship of the dead relative. *Hutchins v. St. Paul, etc., R. Co.*, 44 Minn. 5.

Mississippi.—The statute (Code of 1892) provided that the jury should assess such damages as they might deem "fair and just, with reference to the injury resulting from such death to the party suing," omitting the word "pecuniary" before injury. In *Mobile, etc., R. Co. v. Watly*, 69 Miss. 145, the trial court, acting on the presumption that the omission of the word "pecuniary" from the statute indicated an intention on the part of the legislature to establish a different rule from that prevailing under Lord Campbell's Act, instructed the jury that in an action by a father for the death of his child they might consider "the loss of its society and the comfort the father might take in rearing him and bringing him up to manhood, and the reliance he might place upon him in future years for his support," etc. It was held, on appeal, that this was error, the court saying: "It is a question of dollars enough to pay for the loss the father has sustained," and not for mental agony.

Missouri.—*Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286 (action by father for death of son); *Schaub v. Hannibal, etc., R. Co.*, 106 Mo. 74 (action by a widow); *James v. Christy*, 18 Mo. 162; *Schultz v. Moon*, 33 Mo. App. 329. See also *Tobin v. Missouri Pac. R. Co.* (Mo. 1891) 18 S. W. Rep. 996.

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In an action by a minor daughter for the death of her father, she is entitled to nothing as a *solatium* for mental anguish or suffering resulting from the death or the loss of her father's society. *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.

The loss of the companionship or society of her husband cannot, under the Missouri statute, be considered on the question of damages in an action by the widow. *Atchison, etc., R. Co. v. Wilson*, 48 Fed. Rep. 57, 4 U. S. App. 25. Compare *Blair v. Chicago, etc., R. Co.*, 89 Mo. 335.

North Carolina.—*Kesler v. Smith*, 66 N. Car. 154.

New York.—In an action by a husband for the death of his wife, brought under the New York Act of 1847, amended by Act of 1849, the loss of the society of the wife cannot be considered, although it was further held that the jury might consider the fact that the wife was an educated and amiable woman. *Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25, affirmed 30 How. Pr. (N. Y.) 593, note.

In an action for the death of a child, neither the suffering of the child nor the mental anguish of the parent can be considered on the question of damages. *Dorman v. Broadway R. Co.*, (Brooklyn City Ct.), 16 N. Y. St. Rep. 753, 1 N. Y. Supp. 334.

Ohio.—*Au. v. New York, etc., R. Co.*, 29 Fed. Rep. 72; *Atkyn v. Wabash R. Co.*, 41 Fed. Rep. 193, 22 Ohio L. J. 151.

Oregon.—*Carlson v. Oregon Short Line, etc., R. Co.*, 21 Oregon 450, 53 Am. & Eng. R. Cas. 135; *Holmes v. Oregon, etc., R. Co.*, 6 Sawy. (U. S.) 262, 5 Fed. Rep. 523.

Pennsylvania.—*Pennsylvania R. Co. v. Vandever*, 36 Pa. St. 298; *Caldwell v. Brown*, 53 Pa. St. 453; *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335; *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372; *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; *Pennsylvania Tel. Co. v. Varnau*, (Pa. 1888) 15 Atl. Rep. 624.

Tennessee.—In *Nashville, etc., R. Co. v. Smith*, 9 Lea (Tenn.) 474, 15 Am. & Eng. R. Cas. 469, a charge was held erroneous "in instructing the jury that in estimating damages they might take into consideration the loss of social relation of husband and wife, parent and child, etc., and the advice and protection of the deceased as wife and mother."

In *Nashville, etc., R. Co. v. Stevens*, 9 Heisk. (Tenn.) 12, it was held error for the trial court to charge the jury that if they find that the injury resulted in sudden death, they may, in assessing the damages, consider "the shock to the feelings of the wife." The statute allows no compensation for grief or mere mental suffering of the plaintiff or beneficiary.

Texas.—*McGown v. International, etc., R. Co.*, 85 Tex. 289; *March v. Walker*, 48 Tex. 372; *Galveston, etc., R. Co. v. Worthy*, 87 Tex. 459; *Storrie v. Marshall*, (Tex. Civ. App. 1894) 27 S. W. Rep. 224.

Nothing can be recovered by a father, in an action for the death of his son, on account of the physical or mental suffering and anguish endured by the father on account of the death, nor can his loss of his son's society be considered. *Hall v. Galveston, etc., R. Co.*, 39 Fed. Rep. 18 (action under the Texas statute); *Taylor, etc., R. Co. v. Warner*, 84 Tex. 122.

Utah.—In *Hyde v. Union Pac. R. Co.*, 7 Utah 356, which was an action by a father to recover for the death of his child, it was held error to admit evidence as to the grief of the father. But it appearing that the verdict was for only two thousand dollars, and this amount

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not being claimed to be excessive, the error would not justify a reversal, since it clearly did not influence the jury.

An instruction which tells the jury that damages may be recovered for the mental pain and suffering caused to the mother, who is the heir of the deceased, is error. *Webb v. Denver, etc.*, R. Co., 7 Utah 17, 44 Am. & Eng. R. Cas. 683. See also *Openshaw v. Utah, etc.*, R. Co., 6 Utah 132.

Same—Same—Same—Modified Doctrine.—In some jurisdictions, however, where the legislature has provided that the jury shall assess such damages as they deem fair and just with reference to the injury resulting from the death, thus omitting to limit the damages to the "pecuniary" injury, it is held that the jury may consider the loss of society caused from the death, and the comfort which a parent would have derived from rearing his child. *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20. See also *Nehrbas v. Central Pac. R. Co.*, 62 Cal. 336, 14 Am. & Eng. R. Cas. 670; *Cook v. Clay St. Hill R. Co.*, 60 Cal. 604, 6 Am. & Eng. R. Cas. 175; *McKeever v. Market St. R. Co.*, 59 Cal. 294; *Cleary v. City R. Co.*, 76 Cal. 240 (mental anguish and suffering of parents to be considered); *Howard County v. Legg*, 93 Ind. 530. But see these cases explained in *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 54 Am. & Eng. R. Cas. 101.

The fact that in the *Virginia* statute the word "pecuniary" found in other similar acts has been omitted by the legislature has been regarded as indicating an intention on the part of the legislature to depart from the rule confining the jury in assessing damages to the actual pecuniary injury suffered. See *Matthews v. Warner*, 29 Gratt. (Va.) 570, 26 Am. Rep. 396.

Cons. Stat. of Canada, c. 78, § 3, provide that "the judge or jury may give such damages as they think proportioned to the injury resulting from such death." Under this it is held that although, on the death of a wife, the husband cannot recover damages of a sentimental character, yet the loss of household services usually performed by the wife is a substantial loss for which damages may be allowed, as also is the loss to the plaintiff's children of the care and moral training of their mother. *St. Lawrence, etc., R. Co. v. Lett*, 11 Can. Sup. Ct. Rep. 422, 26 Am. & Eng. R. Cas. 454, affirming 11 Ont. App. 1, 21 Am. & Eng. R. Cas. 165, and *Approving Tilley v. Hudson River R. Co.*, 24 N. Y. 474. Compare *Nashville, etc., R. Co. v. Smith*, 9 Lea (Tenn.) 470.

An instruction to the jury that in estimating the damages they should include any loss which the widow and daughter of the deceased have sustained, or may hereafter sustain, by being deprived of the support, care, nurture, companionship, assistance, and protection of the deceased, is not erroneous in leading the jury to believe that they might assess damages for mental suffering flowing from loss of companionship, where another part of the instruction expressly cautioned the jury that nothing could be allowed on account of the mental suffering of the widow and daughter or as a solace to their feelings. *Wells v. Denver, etc., R. Co.*, 7 Utah 482; *Webb v. Denver, etc., R. Co.*, 7 Utah 363.

In *Missouri Pac. R. Co. v. Bond*, 2 Tex. Civ. App. 104, which was an action by a widow to recover for the death of her husband, it was held proper to allow a witness to testify that the husband was kind and affectionate to his family, and was an indulgent father and husband.

In *Cook v. Clay St. Hill R. Co.*, 60 Cal. 604, 6 Am. & Eng. R. Cas.

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175, the plaintiff, a widow suing for the death of her husband, was allowed to show that it was her deceased husband's custom to be at home after business hours, that his domestic relations were happy and that he was kind and attentive to his invalid wife, and was a kind and indulgent father. This holding, however, has been declared erroneous. See *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 54 Am. & Eng. R. Cas. 101. The statute under which the above holding was made provided that the jury should give such damages "as under all the circumstances of the case may be just." Cal. Code Civ. Pro., § 377.

BALTIMORE CITY PASS. RY. CO.

v.

COONEY.

(*Court of Appeals of Maryland, March 3, 1898.*)

Injury to Boy on Street Car Track—Liability of Company—Question for Jury.—In an action against an electric street railway, there was evidence tending to show that plaintiff, a boy about eleven years of age, was guilty of contributory negligence in standing upon defendant's track until struck by the car; but also evidence tending to show that the motorman should have seen plaintiff in time to avoid injuring him. *Held*, that it was not error to refuse to direct a verdict for defendant.

Same—Duty of Motorman.—If the view of such approaching car was unobstructed, it was not the duty of the motorman to anticipate that plaintiff, while standing near the track, would stumble, and fall upon it, immediately in front of the car.

Harmless Error.—Instructions which are too general, but which, when taken in connection with the instructions for the other side, are not misleading, are not reversible errors.

Same—Evidence.—Defendant having asked plaintiff's witness whether or not there was a fender on such car, in order to cast doubt upon her testimony, it was not error to refuse to strike out other evidence tending to show that there was no fender, although whether or not there was a fender was otherwise immaterial.

Same—Same.—In such action a witness having testified that he saw plaintiff immediately before the accident running along the side of the car with his hand upon it, it was proper to ask him if plaintiff, at such time, could have been seen by the motorman.

Same—Same.—It was proper to ask defendant's master mechanic whether a boy could "steal a ride" on the car by hanging on the ledge on the side of the car, defendant's theory being that plaintiff was injured in that way.

Same—Same.—But such questions in regard to other cars were properly ruled out.

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Same—Same.*—And a photograph of another car was inadmissible to show whether a boy could so steal a ride on the car in question.

Same—Same.—The action of the trial court on an offer to prove by an impeached witness what he had said to people on such car, required no consideration by the appellate court, other witnesses having been subsequently permitted to state what he did say.

APPEAL by defendant from court of common pleas.
Reversed.

Plaintiff offered the following prayers. (1) "That if the jury find from the evidence in this case that on or about the 21st day of May, 1894, the plaintiff while being on Bank street, was struck by a car of the defendant, then and there under the charge and control of the servant or servants of the defendant, and was run over and injured as alleged in the declaration, and further find that the injury to the plaintiff was caused by want of ordinary care and prudence on the part of the servant or servants of said defendant, and not by the want of ordinary care or caution on the part of the plaintiff directly contributing to the injury, as such care and caution on plaintiff's part is defined and explained in plaintiff's second prayer, that then the plaintiff is entitled to recover in this action." Granted. (2) "That the degree of ordinary care and caution required of the said plaintiff, as stated in the plaintiff's first prayer was such ordinary care and caution as ought, under the circumstances of this case, to be reasonably expected from one of the plaintiff's age and intelligence, as testified to by the witnesses." Granted. (3) "That even if the jury should find that there was want of ordinary care and caution on the part of the plaintiff, considering his age and intelligence as mentioned in the plaintiff's first and second prayers, and testified to by the witnesses, yet the plaintiff is entitled to recover; provided the jury find the other facts set out in the first and second prayers of the plaintiff, and further find from the evidence that the servant or servants of the defendant could have avoided the injury complained of by the exercise of ordinary care and

*See note at end of case.

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caution after such servant or servants of the defendant saw that the plaintiff was in danger of being struck by the car of defendant, or might by ordinary care and prudence have seen that the plaintiff was in such position of danger." Granted.

Following are the fourth and fifth bills of exceptions signed for defendant *viz*: (4) "Q. State whether or not you have ever seen boys stealing rides on electric cars similar in construction to this car, No. 412, of the Green Line, by riding on the truck bars, and holding on the wooden leg at the side of the car." To this question the plaintiff objected, and the court sustained the objection, and refused to permit the said question to be asked or answered, to which action of the court in refusing to permit said question to be asked, and in permitting the answer thereto to be given in evidence, the defendant excepted, and prayed the court to sign and seal this, its fourth bill of exceptions, which is accordingly done, this 16th day of June, 1897." (5) "After the occurrences in the foregoing bills of exception, and giving of the evidence therein mentioned, which are hereby referred to and made a part of this bill of exceptions, the defendant's counsel asked the witness Tobe the following question: 'State whether or not you have sufficient familiarity with the construction of cars similar to 412 of the Green Line, constructed as that car was in May, 1894, to be able to tell whether it was practicable for boys to steal rides, by riding on the edge of the truck of the car, or on the truck bar at any place between the east end of the box and the west end of the box.' To this question the plaintiff objected, and the court sustained the objection, and refused to permit the said question to be asked or answered, to which action of the court in refusing to permit said question to be asked, and in permitting the answer thereto to be given in evidence the defendant excepted, and prayed the court to sign and seal this, its fifth bill of exceptions, which is accordingly done, this 16th day of June, 1897."

Baltimore City Pass. Ry. Co. v. Cooney

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, BOYD, and PEARCE, JJ.

Arthur W. Machen and *Wm. S. Bryan, Jr.*, for appellant.

A. Leo Knott, J. Stonewall, and *J. Healy*, for appellee.

BOYD, J. This case is not unlike most suits for personal injuries, based on the alleged negligence of the defendant, in one respect, at least,—that there is a great conflict between the witnesses as to the particulars of the accident. It is not remarkable that persons present at an accident which results so seriously as that in this case should differ in their narrative of the details, but it is difficult to understand how they can vary as much as they do in this case. Seven apparently disinterested witnesses testified that the plaintiff was running along the side of the car that ran over him, and that he was attempting to ride on it by holding on to a ledge that projected from the side of the car, and resting his feet on the truck or some part of the running gear. Yet the plaintiff denied that, and swore he was standing in the center of the track with some other boys, with his back towards the east, the direction the car was coming from; that he “saw the boys make a break towards the north;” that he did not know what they were doing, but he tried to follow them, as he supposed he was in some danger, but stumbled and fell. One witness sustained him in most of his evidence, and another in some particulars. At the conclusion of the plaintiff’s evidence, the defendant offered a prayer that there was no legally sufficient evidence of negligence on the part of the defendant, to entitle the plaintiff to recover, and also another that the plaintiff’s negligence, as appeared from his testimony, had directly contributed to cause the injury, and the verdict must be for the defendant. In passing on those prayers, we are, of course, required to accept as true the evidence offered by the plaintiff, however much we might differ with the jury as to what would have been

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a proper verdict. If the weight of testimony in favor of the losing side be so decided as to satisfy the trial court that the jury acted from passion, prejudice, or some motive other than a desire to do full justice to the parties, then it is the duty of that court, on proper application, to grant a new trial and this court cannot review its action; but when there is evidence legally sufficient to sustain the verdict reached, if the evidence bearing on that side of the controversy be accepted as true, then the court cannot refuse to submit the case to the consideration of the jury. We must, therefore, in passing on those two prayers, determine whether the evidence offered on behalf of the plaintiff precluded him from having his case submitted to the jury, for the reasons assigned in them.

At the time of the accident, the plaintiff was 11 years of age. He was returning home from school, which was held on the corner of Bank and Broadway streets, in the city of Baltimore. The defendant had two railway tracks on Bank street, on which the cars were propelled by electricity, the overhead trolley system having been adopted on that line a few weeks before the accident. There was a valve in connection with the city waterworks in the middle of the eastbound track, near the center of Spring street as it crosses Bank street, and an employee of the city was engaged in putting in an iron plate, to use his language, "to represent a water stop." A number of boys going from school were attracted by this work, and were standing near the workman, in or about the railway tracks. The plaintiff testified that he was going along the north side of Bank street, on the pavement, until he got near Spring street, when he saw some boys standing in the street on the north track; that he went out into the street, and thus described what occurred: "And they walked up a little ways, and I caught up to them; and my face was towards the west. I saw them make a break towards the north: and I don't know what I did it for, but I just run with them, and because I saw them running; and I fell on my hands and feet, and the car struck

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me, and I saw it was going to cut me across my thighs, so I scrambled out in some way, and it caught my left leg below the knee." He said he had been standing there three or four minutes, in the center of the track, with his back towards the way the car was coming; that he heard no bell or gong from the car before he was struck. Miss Oberman, one of his witnesses, after describing the position she was in, and referring to the man at work and the boys standing between the tracks, looking at him, said: "Joseph Cooney came down on the north side of Bank street, and got into the track, and, as he was there, the boys walked up to him. What they were doing I don't know; and, as they stood there, I noticed a car coming down at a very fast rate of speed. With that, I saw the boys make an attempt to run from the track, which they did, except Joseph; and, when he did, I saw him stumble, go down on his hands and feet, and the car went over him." Thomas J. Booz, who was riding on the car that injured the plaintiff, said that the motorman stopped at Caroline street, where other tracks crossed those on Bank street, and rang the gong there, but that he did not ring it as he approached Spring street. The accident according to the testimony of the plaintiff's witnesses, happened about where the easterly side of Spring street intersects Bank street, and at a point about 220 feet, according to the plat in evidence, from the easterly side of the tracks on Caroline street, where the car stopped.

The danger to those lawfully using the streets of cities and towns by reason of the introduction of "rapid transit" on the street railways is apparent to the casual observer, and is forcibly brought to the attention of courts by the numerous cases that have been before them since the streets have been thus used. As street-railway companies have no exclusive right to the use of so much of the bed of the street as their tracks occupy, this court has more than once had occasion to point out the distinction between the rights and duties of persons injured by accidents on street railways and those of persons injured while trespassing on the rights of way

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of railroad companies owning their own tracks; and the duties of the companies cannot be more distinctly announced than was done in *Cooke v. Traction Co.*, 80 Md. 551, 31 Atl. 327. Assuming that the car that caused the injury to the plaintiff approached the crossing at Spring street at a very fast speed, without the motorman sounding the gong or giving any alarm, while there were a number of boys on the track in full view of him, which facts the plaintiff offered evidence tending to prove, the prayer which sought to take the case from the jury on the ground that there was no legally sufficient evidence of negligence on the part of the defendant was necessarily rejected, as, under the circumstances, the question of negligence *vel non* was for the jury. Then, again, if it be true that the plaintiff was standing in the center of the track, with his back towards the car, the question whether the motorman used due care to avoid the accident was also necessarily submitted to the jury. The track was straight between Caroline and Spring streets, with an unobstructed view from one street to the other; and we know of no principle that would permit the court to say that, under such circumstances, the motorman was not guilty of negligence, assuming, as we have said, the plaintiff's evidence to be true. If he was thus standing on the track, the motorman could not have failed to see him if he exercised even a much less degree of care than is required of him, and, if he did see him in that position, it was manifestly his duty to check the speed of his car, or have it under control; but the evidence shows that the car was not stopped until it had gone some distance beyond Spring street. If the plaintiff did stand with his back towards the direction from which the car approached on that track for three or four minutes, as he says he did, he was clearly guilty of negligence. He was 11 years of age, was at that time in the fourth grade of the grammar school he attended, lived near Bank street, and went to school on it. Without some evidence that he was deficient in his mental faculties,—and there was none,—a boy of his age and opportunities must be

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presumed to know that it was negligence on his part to thus place himself on the railroad track. But, as we intimated above, that would not justify the motorman in running over him. Although the plaintiff may be guilty of negligence, the defendant cannot thereby excuse itself if, by the exercise of due care, its agent could have avoided the accident, after discovering the negligent party in his perilous position. The evidence of the plaintiff's witnesses was amply sufficient to authorize the court to submit the question to the jury. The cases in this state are so numerous on that subject that we will only cite some of those in which street railways have been parties. Arnreich's Case, 78 Md. 589, 28 Atl. 809; McKewen's Case, 80 Md. 593, 31 Atl. 797; Appel's Case, 80 Md. 603, 31 Atl. 964. This rule, which has been adopted as an exception to or modification of the general doctrine that a plaintiff who is guilty of contributory negligence cannot recover, is a very just one, as the law will not permit the loss of life, limb, or even property, to be deliberately and carelessly inflicted, when it could by reasonable care and caution be avoided, merely because the injured person was negligent; but the rule should not be extended too far, but should be kept within proper bounds. When it is clear that the plaintiff was guilty of negligence, there must

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be evidence from which the jury can fairly and reasonably find the defendant liable for violation of duty after the plaintiff has thus negligently placed himself in danger, in order to avoid the legal effect of his own negligence. But in this case the evidence of the plaintiff shows that the motorman must either have seen him in the perilous position he occupied in time to warn him or stop the car, or must have failed to see him after he had gotten on the track, because he was not using such care as was required of him while thus rapidly moving through one of the public streets of the city. The second prayer offered at the close of the plaintiff's testimony was therefore properly rejected.

The tenth and eleventh prayers of the defendant were

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practically the same as those above referred to, and it will not be necessary for us to discuss them, as what we have already said disposes of them. It is true, the evidence of the defendant flatly contradicted that of the plaintiff, but that does not relieve us of the necessity of assuming the plaintiff's evidence to be true in passing on such prayers.

The only other prayer offered by the defendant which was rejected by the court is the eighth. In that ruling, we think, there was error. We have already referred at some length to the theory of the plaintiff in regard to the accident, and have also spoken of the testimony of a number of witnesses of defendant who swore that the boy was running along with and riding on the car. But, under the evidence, there was still another view the jury might have taken. They may have believed that the plaintiff was not running with or riding on the car, and yet have found that he was not standing on the track. The prayer is "that even if the jury find that the plaintiff just before the accident, was standing in the street with the other boys mentioned in the testimony, and that, when the other boys ran, he also started to run, and fell, and, in consequence thereof, was run over by the car, and shall further find that the plaintiff, when so standing in the street, was at the side of the track, and not in the way of the car, then the verdict should be for the defendant." Mr. Booz, one of the plaintiff's witnesses, who was riding in the car, said that, just before he got to Spring street, he saw a group of little boys standing alongside of the track. The motorman said he stopped at Caroline street to take on some passengers, and, after crossing that street, he saw a crowd of boys and somebody there that attracted them. He started to ring his gong, running at a slow rate of speed; and when he was about half way between Caroline and Spring streets, the man that was working there and the boys all passed to the north side of the street, and the track was clear. At another place he said: "I am certain that the boys and

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Motorman.

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the gentleman that was working on the track got out of the way of the car, and passed to the north side of the street, and cleared the track two or three feet." Mr. Berryman, a passenger on the car, said: "I was looking out of the window, and saw a crowd of boys and a man digging in the street. They seemed to move to one side, and he kept going on. The track was clear, and the car going very slowly. The first I knew of the accident, the people in the rear part of the car were talking about it." If, in point of fact, the plaintiff, when standing in the street, "was at the side of the track, and not in the way of the car," the motorman could not be required to have anticipated that the plaintiff would stumble and thereby get on the track. Before that prayer was offered, the motorman, the man who was working in the street, four boys who were watching him, the conductor, and a passenger had testified that the gong was sounded as the car approached Spring street. That testimony was contradicted by the plaintiff and one witness swearing they did not hear it ring, and another, who was a passenger, who said it did not ring. There was thus some conflict on that question, although the great preponderance was on the side of the defendant; eight persons swearing it was rung, and only one swearing positively to the contrary. But if, in point of fact, the plaintiff was not on the track, and not in the way of the car, there was no reason, so far as he was concerned, to sound the gong. If he intentionally got on the track just as the car reached that point, without first looking to see if a car was coming, he was guilty of contributory negligence; and if he got on by stumbling and falling on the track too late for the motorman to see him or to prevent running over him, the defendant is not liable. We said above that the defendant might be liable if the testimony of the plaintiff is believed, because there was evidence tending to show that the accident could have been avoided by the use of proper care and caution; but, if the track was clear as the car moved towards Spring street, the defendant would not be liable if the

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plaintiff stumbled and fell on the track as the car was passing. The prayer should have been granted, to meet that view of the case.

We do not see any reversible error in the rulings on the plaintiff's first and second prayers. They are very general, and of the character that is sometimes misleading; but, when taken in connection with the defendant's prayers that were granted, the jury ought not to have been misled by them. Same—Harmless Error.

It is true that there was no special evidence offered as to the intelligence of the plaintiff; but he was a witness before the jury, and they had an opportunity to judge of his intelligence from his testimony. What we have said about the duty of defendant's agent after the plaintiff got on the track, as testified to by him, sufficiently states our views on that question, without discussing the plaintiff's third prayer. This disposes of the objections to the prayers urged before us.

The first exception was to the refusal of the court to strike out the evidence of one of the witnesses that there was no fender on the car. The defendant's seventh prayer, which was granted, instructed the jury that they were not at liberty to find from the evidence that the accident in question was caused by any failure of duty on the part of the defendant in respect to providing a fender or guard. On cross-examination of Miss Oberman, the defendant had endeavored to cast doubt on her account of the accident, by asking her if there was not a fender that obstructed her view. The court was therefore right in refusing to strike out all evidence on that subject, especially as it instructed the jury as to the effect of it. Same—Evidence.

We can see no valid reason why the question asked the witness so embraced in the third bill of exceptions should not have been allowed. He had testified that he saw the plaintiff running along the side of the car, with his hand on a bar on the side, and a book in his right hand; that he fell, and went under the wheel. He was then asked whether the Same—Same.

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plaintiff was "in a position where the motorman could see him." The object of that testimony is apparent,—that the defendant hoped to show that the motorman could not see him in that position, and hence that no negligence could be attributed to him for not stopping the car or taking some steps to prevent his falling. It was a pertinent question as to whether he was near the front, the center, or rear of the car, and, if the witness could tell whether the motorman could see him in the position he was, it was proper for the jury to know that fact. There was therefore error in not allowing that question to be answered.

The sixth exception was to the refusal of the court to allow the defendant to ask the witness, F. E. Tobe, who was master mechanic of defendant, whether a boy could "steal a ride" on the car that ran over the plaintiff by hanging on the ledge on the side of the car, and putting his feet on the truck or bar between the truck and wheel guard. As we have said, the theory of the defendant was that the plaintiff was injured in that way, while the plaintiff not only claimed that he was not, but may have contended before the jury that he could not have held on to the car in that way, as, indeed, was argued in this court. Manifestly, then, it was permissible for the defendant to show that a boy could so ride on the car; and the witness who had been master mechanic of the defendant for 6 years, and assistant master mechanic for 18 years, and who had charge of the entire rolling stock of the company, would be as competent as any one could be to express an opinion on that subject. His knowledge of the construction of the car would enable him to speak intelligently and positively, and he should therefore have been permitted to answer that question.

The questions contained in the fourth and fifth bills of exception propounded to that witness with reference to other cars of the company were properly ruled out, as it was as to this particular car, and not others, that the question was relevant. The refusal to allow the introduction of a photograph

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of another car, in Green's case, 56 Md. 84, is a similar ruling.

The action of the court on the offer to prove by William Dickell what he said to people on the car about the accident, as embraced in the seventh exception, would seem to require no consideration by us as two witnesses were afterwards permitted to state what he did say. That character of evidence for the purpose of corroborating a witness who has been impeached was considered in Railway Co. v. Knee, 83 Md. 77, 34 Atl. 252, where the authorities are reviewed; but the cases in this state do not go to the extent of holding that the impeached witness can himself testify to what he said on other occasions, in order to corroborate his testimony given at the trial. But, as indicated above, we are not called upon to pass upon that question.

For error in rejecting the defendant's eighth prayer, and refusing to admit the testimony proffered as stated in the third and sixth bills of exception, the judgment must be reversed. Judgment reversed, with costs, and new trial awarded.

NOTE.

Photographs—Evidence.—In an action against a street railway company to recover for personal injuries, the photograph of a car other than the one causing the injury is inadmissible, although there is evidence to show that the cars are alike. People's Pass. Ry. Co. v. Green, 56 Md. 84, 6 Am. & Eng. R. Cas. 168.

MASSACHUSETTS LOAN & TRUST CO., *et al.*

v.

HAMILTON.

(*Circuit Court of Appeals, Ninth Circuit, May 3, 1898.*)

"Railroad"—Construction of Statute.—The word "railroad," of itself, has no such fixed definition as to enable a court to determine whether, by its mere use in a statute, it applies to street railways or not.

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Same—Street Railways—Whether Railroads.*—Section 707, Comp. St. Mont. providing that a judgment against any "railway corporation" for personal injuries shall be a lien against the corporate property superior to the lien of any mortgage or trust deed, does not apply to street railroads.

APPEAL by defendant from the Circuit Court of the United States for the District of Montana. *Reversed.*

Ransom Cooper and McConnell, Clayberg & Gunn, for appellants.

Edwin W. Toole, Thos. C. Bach, and Jos. K. Toole, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. Appellee, in an action against the Great Falls Street-Railway Company to recover damages for personal injuries received, obtained a judgment for \$7,500, with costs, and brings this suit in equity to enforce the judgment lien against appellants, as a prior and superior claim and lien, upon the property of the street-railway company, to the mortgage lien and claim of the Massachusetts Loan & Trust Company. Whether a judgment rendered against a street-railway corporation for personal injuries has priority over the lien of a mortgage upon the corporate property depends upon the interpretation to be given to the provisions of section 707 of the fifth division of the Compiled Statutes of Montana of 1887, which reads as follows:

"A judgment against any railway corporation for any injury to person or property, or for material furnished, or work or labor done upon any of the property of such corporation, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this act."

Does this section apply to street railroads? Was it the intention of the legislature, at the time of the adoption

*See *Fidelity Loan & Trust Co. v. Douglas* (Iowa, 1898), 9 Am. & Eng. R. Cas., N. S., 713.

of this section, that it should apply to all railroad corporations within the state,—to street railroads, as well as to commercial and steam railroads, operated by means of locomotives and cars, for the transportation of passengers and freight? Is there anything in the laws of Montana which sheds any light upon the question of the intent of the legislature? If not, how is the intent to be ascertained? What do the authorities say upon this subject?

In May, 1873, the legislature of the territory of Montana passed "An act to provide for the formation of railroad corporations in the territory of Montana" (St. Mont. 1873, p. 93). The provisions of this act are general in their character, and are all specially applicable to steam railroads. At the time of the passage of this act there were no railroads of any kind within the territory. In 1887 the legislature of the territory passed "An act in relation to railroads," consisting of six sections, which, in the Compiled Statutes of Montana, is treated as a supplement to the railroad act of 1873, and numbered sections 702 to 707; the last section, heretofore quoted, being the one under consideration. Section 702 to and including 706 are specially applicable to steam and commercial railroads. At the time of the passage of this act there were no street railways within the territory of Montana, but at the same session (1887) the legislature passed an act providing for municipalities licensing and authorizing the construction of street railroads. Section 325 of the municipal act provides, among other things, that "the city council of all cities incorporated under this act shall have the following powers" (subdivision 14): "To regulate and control the laying of railroad tracks and prohibiting the use of engines and locomotives propelled by steam or to regulate the speed thereof when used;" (subdivision 16) "to license and authorize the construction and operation of street railroads and require them to conform to the grade of the streets as the same are or may be established." The legislature of Montana in 1893 passed an act, approved March 2, 1893, extending the provis-

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ions of chapter 36 of the Compiled Laws of 1887, relating to the conditional sale of railroad equipments, to street-railway equipments. This act was entitled "An act relating to certain contracts for the conditional sale, lease or hire of railroads and street railway equipments and rolling stock, and providing for the recording thereof." Section 393 of the Civil Code of 1895 provides, "The purposes for which the private corporations mentioned in the last section are" (subdivision 15) "the construction and maintenance of a railroad and of a telegraph line in connection therewith and a street railroad of any kind." The constitution of Montana (section 12, art. 15) declares that "no street or other railroad shall be constructed within any city or town without the consent of the local authorities," etc.

But little is gained by a reference solely to the meaning of the word "railroad." The word, of itself, has no such fixed definition as to enable the court to determine whether, by its mere use in a statute, it applies to street railways or not. It may or may not include them. It may be used in the statute in its broadest sense, or it may be used in its technical or popular sense. 19 Am. & Eng. Enc. Law, 777 *et seq.*; Bishop v. North, 11 Mees. & W. 418; Lieberman v. Railway Co., 141 Ill. 140, 147, 30 N. E. 544; Bloxham v. Railroad Co., 36 Fla. 519, 539, 18 South. 444; Funk v. Railroad Co. (Minn.) 63 N. W. 1099. In its broadest sense, it undoubtedly includes a street railroad, and every other kind of a road or way on which rails of iron are laid for the wheels of cars to run upon, whether propelled by steam, electricity, horse, or other power, carrying light or heavy loads of freight or passengers, or both. 2 Bouv. Law. Dict. tit. "Railroads." In its technical sense it does not apply to street railroads. Louisville & P. R. Co. v. Louisville City Ry. Co., 2 Duv. 175; Ror. R. R. 1422; Elliott, Roads & S. 558.

It may be, as counsel for appellee claim, that searching for legislative intent is often like "hunting for a needle in a haystack"; but it is nevertheless the duty

"Railroad"—Construction of Statute.

of courts to make the search by applying the usual magnets of construction, and drawing therefrom, through the ordinary channels of thought, such intent. There is no other way to determine the question, and the fact that it is difficult simply makes it more necessary that a thorough search be made. If there is any doubt about the true meaning of the word or term used in a statute, the legislative intent is not to be determined from that particular expression, but from the general legislation of the state concerning the same subject-matter. It may in some connections have a broad and comprehensive meaning, and in others a narrow and limited meaning. As a general rule, statutes are presumed to use words in their popular sense, and courts often apply this rule in order to arrive at the object and intent of the legislature. End. Interp.St. § 76. But in all cases the safest rule is to take the entire provisions of the statute where it is used, and thereby ascertain, if possible, what the legislature intended. The meaning of the word must always depend upon the context and the legislative intent of the statute in which it is used, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view. Potter's Dwar. St. 194, *note* 13. Following these, or other similar, rules of construction, the courts have in many instances held that the word "railroad" does in certain statutes include street as well as steam railroads, and in others that it refers only to the railroads of commerce. No particular stress should be given to the difference in the motive power of the respective roads. The difference between street railroads and railroads of commerce for general traffic is well understood. The difference consists in their use, and not in their motive power. A railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from any part of the street as a public way; which runs at a moderate rate of speed, compared to the speed of traffic railroads; which carries no

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freight, but only passengers from one part of a thickly populated district to another, in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers,—is a street railroad, whether the cars are propelled by animal or mechanical power. *Williams v. Railway Co.*, 41 Fed. 556. The railroads of commerce derive their powers from, and are governed by, national or state legislation. The street railways are generally regulated and controlled, principally, by municipal laws. It has been held that street-railway companies are "railroad corporations," within the meaning of "An act to enforce against railroad corporations" certain provisions of the state constitution, where such constitutional provisions include all corporations organized for business in its prohibition, and no words are used in the body of the act which were intended, or could fairly be used, as making any distinction between steam and other railroads, and where it is apparent that both street railroads and steam railroads are within the mischiefs recited in the preamble or other parts of the act, and within the remedies provided for in the act. *Cheetham v. McCormick*, 178, Pa. St. 187, 191, 35 Atl. 631. In Tennessee it is held that an act relating to railroads, which requires certain precautions to be used in the movement of trains in the city of Memphis, is applicable to a dummy train of street cars. *Katzenberger v. Lawo*, 90 Tenn. 235, 16 S. W. 611. And in Ohio, that a statute giving a lien to mechanics, laborers, etc., for work done upon "any railroad, turnpike, plank road, canal or any public structure," applies to street railroads. *New England Engineering Co. v. Oakwood St. Ry. Co.*, 75 Fed. 162.

The words "railroad" and "railway" are synonymous, and under all ordinary circumstances, they are to be treated as without distinction in meaning. As said by Mr. Justice Green in *Gyger v. Railway Co.*, 136 Pa. St. 96, 104, 20 Atl. 399:

"When either one or the other of these words is used

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in a statute, and the context requires that a particular kind of road is intended, that kind of a road will be held to be the subject of the statutory provision; but if the context contains no such indications, and either of the words is used in describing the subject-matter, the statute will be held applicable to every species of road which is embraced within the general sense of the word used." *Hestonville, M. & F. Pass. R. Co. v. City of Philadelphia*, 89 Pa. St. 210; *Borough of Millvale v. Evergreen Railway Co.*, 131 Pa. St. 1, 18 Atl. 993; *Rafferty v. Traction Co.*, 147 Pa. St. 579, 589, 23 Atl. 884.

A corporation with authority to construct, complete, and operate a railroad is none the less a railroad corporation, within the statute authorizing municipal subscriptions to railroad companies, because it is also a coal or a mining or a furnace or a manufacturing company. *Randolph Co. v. Post*, 93 U. S. 502, 511; *Improvement Co. v. Slack*, 100 U. S. 648, 659.

In *Electric Co. v. Simon*, 20 Or. 60, 65, 25 Pac. 147, 148, the contention of the plaintiff was that the statute of Oregon, which, among other things, provides that "a corporation organized for the construction of any railway" might condemn land for a right of way and other specified purposes, contemplates the exercise of such power as much by street and suburban railways propelled by horse power or electricity as railroads where cars are propelled by steam. The court, after reviewing the various provisions of the statute, specifying the objects and purposes for which land might be taken by railroad corporations, held that it did not apply to the street railway, so as to authorize it to take private property, without the consent of the owner, for its own use as a right of way. In the course of the opinion the court said:

"While it is true that the word 'railway' may include railroads operated by steam, as well as those whose cars are propelled by some other power, yet it is common knowledge that such corporations as belong to the latter class are usually operated as street rail-

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ways for local convenience. The plaintiff is an electric company, and as such, we know, belongs to the class of corporations operated as street railways for the benefit of the local public."

After quoting several provisions of the statute, the court said:

"Few, if any, of these provisions have any reference to the class of corporations to which the plaintiff belongs, and was scarcely intended to apply to them. They contemplate and authorize a railway to be constructed where none was built before, through the country; requiring bridges, cuttings, fillings, and embankments, and sometimes tunnels through hills and mountains, and also the building of depots and stations for the accommodation of freight and passengers, of engine houses, repair shops, switches, and turnouts, to enable the corporation to properly conduct its business."

These authorities show the necessity that exists for the courts, in all cases, to look carefully to the statute itself, in connection with the history of the times, and the contemporaneous legislation, in order to discover in what sense the word "railroad" is used, or to ascertain what particular kind of a railroad the legislature intended should come within its provisions. The general railroad act of 1873 may be said to have reference only to the railroads of commerce, and it is fair to presume that the legislature did not then have in mind the construction of street railways, although sections 1, 2 and 3, authorizing the formation and incorporation of railroad corporations, are broad enough to include corporations for the construction and maintenance of street railways.

In *Oler v. Railroad Co.* 41 Md. 583, 589, objection was made to the certificate of incorporation for a horse-railroad company on the ground that the provisions of the act of 1870, under which it was organized, referred to roads similar to those alone upon which steam is used as the motive power. The court said:

"We do not see why so limited a construction should be put upon this law. It would be against both its

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spirit and letter. The term "railroad" is used without qualification or restriction, and we have found nowhere—either in the preamble or body of the law—any allusion to the motive power used, as limiting its ordinary meaning or making a distinctive class. It is very true that many of the special requirements contained in the law are applicable only to railroads of the character of those upon which steam is now used. Had they not been made parts of the law, it might have furnished an argument, that would not have been without weight, that such roads were intended to be excluded from its operation; but we do not understand that their being in the law can furnish any sound reason for the exclusion of other classes of railroads, when the language of its general provisions, as is the case with the law before us, is broad enough to embrace them."

See, also, *City of Chicago v. Evans*, 24 Ill. 52; *City of Clinton v. Clinton & Lyons Horse Ry. Co.*, 37 Iowa, 61; *New York Cable Co. v. Mayor, etc.*, of New York, 104 N. Y. 1, 10 N. E. 332; *Lieberman v. Railroad Co.*, *supra*.

In New York, from 1850 to 1884, all street railroads were incorporated under the general steam railroad act. Cook, Stock, Stockh. & Corp. Law, § 912, and authorities there cited. But no question is here presented whether street railways can be incorporated under the provisions of the railroad act. The street-railway company in this case was not organized under the general railroad act of Montana. It is a corporation organized and existing under and by virtue of the laws of the state of New Jersey. The supplemental act passed in 1887 "in relation to railroads" does not mention street railways, and all its provisions, independent of the section under consideration, are specially applicable to the railroads of commerce. Street railways were then in contemplation in the minds of the members of the legislature, for at the same session an act was passed giving to all incorporated cities the power to license and authorize the construction and operation of street railroads. What significance, if

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any, should be given to these facts? Is it not shown, from all this legislation, including section 12 of article 15 of the state constitution, that the legislature of Montana regarded railroads and street railroads as being different in their character? Is it not fair to infer that when the term "railroad" is alone mentioned the act refers only to the railroads of commerce, and is not this inference strengthened by the fact that when "street railways" are clearly intended to be embraced in the provisions of the act the prefix "street" is used in order to specially designate the kind and character of railroad to which the law is intended to apply? We are of opinion that this act, in all of its provisions, was intended by the legislature to apply only to the railroads of commerce.

Same—Street Railways—Whether Railroads.

This conclusion is supported by a careful consideration of each of the six sections, and the evident object and purpose of all their provisions. The first section (Comp. St. Mont. 1887, § 702) provides that "any railroad corporation chartered by or organized under the laws of the United States, or of any state or territory whose line of railroad shall reach or intersect the boundary line of the territory at any point, may extend its railroad into this territory from any point or points to any place or places within the territory, and may build branches from any point of such extension or continuation of any such extension or branch," and then directs what shall be done by the corporation before making such extension, etc. This is manifestly applicable only to the railroads of commerce, and has no application whatever to street railways. The same can be said of the second section (703), providing that "any two or more railroad corporations whose respective lines *** are wholly or partly within this territory" may, in certain cases, be operated together as one property, and their stock, franchise, and property consolidated so as to become one corporation, etc. Then follows the third section (704), which provides that "any railroad corporation whose line is wholly or partly within this territory, or reaches the

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boundary line thereof, * * * may lease or purchase the whole or any part of the railroad or line of railroad of any other railroad corporation" together with the rights, powers, privileges, and franchises pertaining thereto. These sections furnish the earmarks that show plainly what character of railroad the legislature had in view at the time of the passage of the act. Section 5 (706) starts off with the proviso that "any railroad corporation whose line is wholly or partly within this territory, whether chartered by or organized under the laws of this territory or of the United States or of any other state or territory, shall have authority and power to make, issue, negotiate and deliver its bonds, securities or obligations, * * * execute and deliver such mortgages or deeds of trust upon any or all of its property" as the board of directors may determine or direct, and provides that the record of such mortgages or deeds of trust in the office of the secretary of the territory shall be notice of their existence and contents to all parties whomsoever, without any further record. Admitting, for the sake of argument, that some provisions of this section might be applicable to street railways, if they were alluded to or mentioned in the act, it is apparent from the object, scope, and effect of the previous sections, and the language at the head of the provisions in this section, that the legislative mind was directed solely to the character of railroads operated by steam for the purpose of the general traffic of carrying freight and passengers, and herein designated as the "railroads of commerce," as distinguished from street railways in the cities and towns for the convenience of passengers only.

This brings us to the sixth section (707),—the one under consideration. It is true that the words, "a judgment against any railway corporation for any injury to person or property," if taken by themselves, without reference to the language in the latter part of the section, which provides that "such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this act," or to the language of the

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previous sections, is broad enough to apply to all kinds of railways. But the judicial mind must draw its inspiration from the language of the entire act, its declared object and purpose, the mischiefs, if any, that it was intended to prevent, and the special powers and remedies it was intended to give. In the passage of this particular section the legislature seems to have had in mind the thought that the railroads with the "iron horse," extending through various counties of the state, in regard to which all the previous sections had special reference, ought to be subject to some distinctive legislation in order to protect the class of people for whose special benefit this provision was inserted. It is a matter of common knowledge that there are many more judgments obtained in favor of parties who have been injured in their persons or property against the railroads of commerce than against the local street railways in the cities, because of the greater risks and hazards. The same is true of the other class of judgments. Moreover, such railroads often commence the construction and operation of their roads by executing and recording a blanket mortgage or deed of trust covering all the property they then had or might at any time thereafter acquire, thus making it difficult for people who are injured in their person or property, or those who have furnished supplies or performed labor for the railroad corporation, to obtain their just demands; and hence it was deemed proper, if not necessary, to pass such a law, as a protective measure. If it can be said that such persons also needed protection from street railway corporations, the answer is that, if the legislature so thought, it was its duty—as in the passage of other acts at the same session—to have included street railways within the terms of the section. We have no power to insert "street railways" into this section of the act, with the knowledge we have that all the other provisions of the act refer in clear, plain, and unequivocal terms to other kinds of railways or railroads. Especially is this true when we find acts passed at the same session where the word "street" is used as a

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prefix to the word "railway" or "railroads" in all acts intended to apply to street railroads. It is true that the courts may in certain cases impute a legislative intent not expressed with perfect clearness, where the words used import such intent, either necessarily or by a plain and manifest implication. But it would be a dangerous exercise of judicial authority, not to be justified by any consideration, for a court to declare a law by the imputation of intent, when the words used do not import it, either necessarily or by plain implication, and when all the surroundings of the enactment clearly show that the construction claimed could not have been within the legislative thought. *Suth. St. Const. § 433.* It cannot reasonably be said that the words "railroad corporations" are used in the statute "without qualification or restriction," when the language used in the various provisions of the act clearly indicates the kind of railroads the legislature had in view.

In *Funk v. Railway Co.* (Minn.) 63 N. W. 1099, it was held that chapter 13, Gen. Laws 1887, which provided that "every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof without contributory negligence on his part when sustained in this state," is not applicable to a street-railway corporation. The reasons given for the conclusions reached are in some respects specially applicable to this case. The court among other things, said:

"But if we assume that at the time of the passage of the law of 1887 the history of street cars was generally known, and their use, method of operation, and dangers therefrom well understood, can it be fairly and reasonably held that it was the legislative intent to apply the term 'railroad' to street railways? It is a matter of common knowledge that street cars operated by cable or electricity are more readily managed than those operated by steam, where long passenger and

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freight trains, with their weight and momentum, are not so easily controlled. A street car is generally run separately, rarely with more than two or three coupled together, and there is but little danger of collision. They do not run so rapidly, their movements are easily and quickly checked, and the roadbeds are constructed upon level or graded streets, without deep cuts, and generally lighted. Nor do street railways carry freight. The greatest railroad hazard, and danger of personal injury to railroad employees, arises from operating freight trains. There is no such danger in operating street railways, whatever may be the motive power, because they do not carry freight. Especially is the danger in coupling freight cars entirely absent. They get their business from the street, usually in populous cities, where passenger travel is the only business carried on. Street cars do not usually run beyond the city limits, and none beyond the state boundary. The words in the law of 1887 making a railroad corporation operating a railroad in this state liable for damages 'when sustained within this state' were undoubtedly aimed at the railroads operated by steam, where their lines extended beyond the jurisdiction of the state. It is true these restrictive words would include railroads operated by steam wholly within the state, but they were inserted to prevent the bringing of suits where the injury was sustained upon railroads outside of this state, but where the lines of the same railroad come within the boundary of our own state. Hence the words, 'when sustained within the state,' evidently refer to railroads operated by locomotives, and it was such railroads the legislature had in contemplation when this term was used. Through our territorial and state legislation, the term 'railroad' has acquired a definite and well-understood meaning, and it has never been understood to include street railways. It is usually applied to the ordinary steam railroad of commerce, and, when there has been legislation in regard to street railways, they have so designated. * * * If we were to hold that the term 'railroad' in the law of 1887 applied to street

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railways because the word is broad enough to cover all roads constructed of iron or steel rails for wheels of cars to run upon, we see no reason why it should not be so construed whenever found in the other legislation of this state. This would require street railways to build depots and waiting rooms for passengers, for there is just as much reason to make the word 'railroad' applicable in this respect as to personal injury cases. This is but one of the very many instances where by the use of the word 'railroad' the company is required to perform certain duties, to which it cannot reasonably be said that the meaning of such words includes street railways. To so construe it in such instances would lead to confusion, and be a palpable violation of the legislative intent."

MITCHELL, J., in a concurring opinion, said:

"But according to common popular usage the word 'railroad' without any qualifying or explanatory prefix, is generally understood as referring exclusively to ordinary commercial railroads, used for the transportation of both passengers and freight, and whenever street railroads are referred to the word 'street' is prefixed. This is also the general legislative use of the words. In all the legislation of this state I have found no act (unless this be an exception) in which the word 'railroad' or 'railway', standing alone, was not evidently intended to apply exclusively to ordinary commercial railroads. Neither have I found an act (unless this be an exception) which had reference to street railroads in which the word 'street' was not prefixed. I do not claim that there might not be a law enacted where it would be evident, from its subject-matter and object, that the word 'railroad' was intended to include street railroads. But in my opinion this is clearly not such a case. The occasion for enacting this law was the peculiar risks incident to the operation of railroads, and especially those resulting from the negligence of fellow servants. The remedy sought to be obtained was better protection to railroad employees from these peculiar hazards. * * * The question is not whether the legisla-

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ture had the power to place street railroads in the same class with ordinary commercial railroads, but whether they have in fact done so. The difference in conditions affecting the risks to which employees are exposed is sufficiently substantial to authorize the legislature to make the law applicable to ordinary commercial railroads alone, and furnishes, in my judgment, ample reason for concluding that they so intended, and that they used the word 'railroad' in its ordinary popular sense, and in the sense in which they themselves had generally used it in other statutes." *Riley v. Railroad Co.* (Tex. Civ. App.) 35 S. W. 826; *Railway Co. v. Johnson* (Wash.) 25 Pac. 1084; *Sears v. Railway Co.*, 65 Iowa, 742, 744, 23 N. W. 150.

The direct question here involved was presented in *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 68 Fed. 82. The court held that the Iowa statute (McClain's Code, § 2008), which declares that "a judgment against any railway corporation for any injury to any person or property, shall be a lien within the county where recovered on property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the 4th day of July, A. D. 1862," did not apply to street railroad corporations. The court said:

"It cannot be questioned, on the one hand, that a company engaged in operating street cars upon lines of rails laid down along the streets of a town or city, for the transportation of passengers, is, in one sense, a railway corporation, nor, upon the other hand, that there is a marked and recognized distinction between street-railway lines and those engaged in the general passenger and freight traffic of the country. * * * The point in dispute resolves itself into the question whether, in the legislation of the state, the terms 'railroad or railway lines,' or corporations operating railroads or railways, should be held to include street railways, when the latter class is not specifically named. The section of the Code already cited * * * forms part of chapter 5, tit. 10, McClain's Code Iowa, which in-

cludes the legislation in regard to railways. An examination of the 147 sections of this chapter shows that in none of them are street railways named, and at least 137 thereof show affirmatively, by the nature of the provisions thereof, that it was not the intent to include street railways therein; and it is therefore the fair inference that the entire chapter was intended to apply only to the other class of railways. Thus, in this chapter it is enacted that every corporation operating a railway shall, at all highway crossings, construct cattle guards, and erect signboards; must connect its line, by means of a Y, with all intersecting lines, and receive and draw the cars of all connecting lines; must stop not less than 200 feet from any other line of railway intersected or crossed; and must give signals, by bell or whistle, beginning at least 60 rods from all highway crossings, of the approach of all trains. The application of these and similar provisions of this chapter would be practically a prohibition of the running of street cars."

After pointing out other distinctions, the court proceeds:

"So far the question has been considered as though all the provisions of chapter 5, tit. 10, McClain's Code, had been adopted at one time by the legislature; whereas, in fact, they were not, and therefore it can be properly urged that regard must be had to the act which first adopted into the legislation of the state the provisions of the section under consideration; for if it should appear from the terms of that act, as it passed the legislature, that it was intended to include street railways within its provisions, such legislative intent would not be changed or defeated because the section was subsequently codified as part of chapter 5, tit. 10."

After referring to the 11 different sections of the supplemental act (Laws Iowa 1862, c. 169), it is said:

"It is clearly apparent that, of these sections, at least nine have no application to street railways; and why, therefore, should it be held that the other two, to wit, sections 7 and 9, were intended to include street

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railways, when they are not named therein, and the same words, to wit, 'railroad company,' are used in these sections as are employed in the other nonapplying sections? Upon what theory can the court rightfully enlarge the meaning of the words 'railroad company,' as used in sections 7 and 9, over the plain construction applicable to these same words when used in the other sections of the statute? There is certainly nothing in the language of these sections, or in the context, that gives support to the contention that the legislature intended these sections to apply to a class of corporations not included in the other sections of the act. * * * The conclusions reached are that, as there is in fact a marked distinction between railroads used in the furtherance of the general passenger and freight traffic of the state, and those used for street purposes only, we should naturally expect to find in the legislation of the state provisions applicable to the one class which are not applicable to the other; that an examination of the statutes of the state shows that such difference is recognized therein; that chapter 5, tit. 10, McClain's Code, is intended to embrace the provisions applicable to companies engaged in the general passenger and freight traffic; that, as that is the general purpose of the chapter, the court is not justified in excepting out of it one or two sections, and holding that they include also street railways, when the latter are not specifically named therein, and there is nothing in the context of the chapter, or in the text of the original act of 1862, which shows the legislative intent to include street railways therein; that the adoption of other sections of the statute, not included in said chapter 5, which authorize the construction and operation of street railways under the control of the city or town, with special provisions in regard to right of way and liability for injuries caused to others, shows clearly that the legislature did not intend to include street railways within the provisions of chapter 5, tit. 10; and that the court cannot so include them upon the argument that the proper protection of the

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people requires the application of the same rule to both classes of corporations,—it being for the legislature to give force to this argument, if it deems it advisable so to do.”

Having arrived at the conclusion that the statute in question is not applicable to street railroads, and this being conclusive of the case, it is unnecessary to notice any of the other objections presented by appellant. The decree of the circuit court is reversed, and the cause remanded,* with instructions to dismiss the bill.

SOUTH CHICAGO CITY RY. CO.

v.

CALUMET ELECTRIC ST. RY. CO.

(*Supreme Court of Illinois, Feb. 14, 1898.*)

Contracts Creating Monopolies*—Extension of Street Railway—Bill to Enjoin.—A street-railway company contracted with another street-railway company not to cross the tracks of the latter at grade, except at a certain point, the consideration being that the former company should be allowed to extend its tracks across such point. *Held*, that the main object of the contract was to prevent competition, there being a city ordinance prohibiting such crossings except at grade, and that the contract was therefore contrary to public policy and void.

Contract Illegal in Part—Enforcement.—Where the unobjectionable part of a contract is the consideration of the part that is contrary to public policy and void, a court of equity will not enforce any portion of it by injunction.

APPEAL by plaintiff from appellate court, First district. *Affirmed.*

Appellant began suit in the circuit court of Cook county, on the chancery side thereof, to enjoin appellee from operating its motors and cars, over and upon certain crossings of its tracks, and to prevent appellee from constructing or putting in

Case Stated.

*See note at end of case.

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any further or other crossings over its tracks. The circuit court sustained a general demurrer to the bill, and dismissed it for want of equity, at the complainant's cost. The appellate court having affirmed that order, this appeal is prosecuted. 70 Ill. App. 254. The parties were street-railway corporations organized under the railroad corporation act of this state, operating street railways by electricity, using the overhead trolley system, in the south part of the city of Chicago; their lines crossing each other at one or more points. On the 1st day of December, 1892, they entered into a contract in writing, as follows: "Whereas, the Calumet Electric Street-Railway Company is entitled to cross with a double-track crossing, at grade, the tracks of the South Chicago City Railway Company at or near the junction of Commercial avenue and South Chicago avenue, and also at Ninety-Second street and Harbor avenue; and whereas, the party of the second part desires to construct a loop, for the convenience of operation of its road, from its tracks on South Chicago avenue along Ninety-First street, and returning on Ninety-Third street, and, in order to construct said loop as an independent line, it would be necessary to cross the tracks of the party of the first part, lying on Commercial avenue, at Ninety-First street, and again at Ninety-Third street; and whereas, both parties believe that crossings of electric railroad tracks at grade are dangerous to the public traveling on such roads, respectively, as well as inconvenient, expensive, and dangerous to the companies operating them, and desiring to avoid any crossings of their roads at grade, except those above mentioned, the party of the first part is willing to grant to the party of the second part a right of use, to be exercised jointly with the use by the party of the first part, in the ordinary course of its business, for the purpose of completing and operating its said proposed loop, the west track, lying on Commercial avenue, between Ninety-first street and South Chicago avenue, upon the considerations, conditions, and limitations in said contract stated, and the party of

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the second part is willing to receive such rights in place and stead of crossings of said tracks, as had been proposed : Now, therefore, this agreement witnesseth, that upon the conditions, and in consideration of the premises, etc. [here follows the grant to the appellee of the right to use appellant's west track, in common with appellant, on Commercial avenue, between Ninety-First street and South Chicago avenue, with conditions, items, etc., for a period of 19 years from the 1st of January, 1893] ; and said parties mutually agree to and with each other, and this contract is made upon the express condition, that with the exception of the crossings mentioned in the recitation of the contract, namely, at the junction of Commercial and South Chicago avenues, and at the junction of Ninety-Second street and Harbor avenue, no other crossings of one of the said railroad companies' roads over the other, or over their joint tracks, shall ever be made, constructed, or operated at grade, under any existing ordinance, or which may hereafter be granted, without the written consent thereto of the parties to this contract, their successors or assigns." The bill shows that appellee, after the making of the contract, obtained a license of the city of Chicago to build the necessary connection on Ninety-First street, and thereafter completed the loop, and continued its operation until December 22, 1895; that on November 11, 1895, the city of Chicago, by ordinance, granted the right to appellee, upon complying with certain conditions, to extend its lines over certain streets, and to cross at grade the tracks of appellant previously constructed, in 12 different and distinct places ; That on November 22, 1895, appellee abandoned the connection with appellant's track at the intersection of Ninety-First street and Commercial avenue, and pursuant to the ordinance of November 11, 1895, but contrary to the terms of the contract, and under the protest of appellant, constructed a crossing at grade over the tracks of appellant at the intersection of Ninety-First street and Commercial avenue, and on December 26, 1895, in a similar manner, constructed a

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crossing at grade over appellant's tracks at the intersection of Ninety-Second and Erie avenue; that by means of these crossings and connecting lines, appellee constructed a new loop, extending from its main track, at the intersection of South Chicago avenue and Ninety-First street, to Erie avenue, south on Erie avenue to Ninety-Third street, and west on Ninety-Third street to its main track, at about the intersection of South Chicago avenue and Commercial avenue, and ever since has continued to use this loop; that at various other times and places, in a similar manner, pursuant to the ordinance, appellee has constructed other crossings at grade with appellant's track. The prayer is that the contract between the parties of December 1, 1892, be adjudged and decreed in full force and effect, and that the defendant be enjoined from operating its motors and cars over and upon each crossing of the tracks of the complainant described in the bill, except those at the intersection of South Chicago avenue and Commercial avenue, and that on Harbor avenue opposite Ninety-Second street, and from constructing or putting in any further or other crossings over the tracks of complainant, as they now exist, or may hereafter be constructed by the complainant, without its consent in writing.

Charles M. Osborn and Samuel A. Lynde, for appellant.

Judson F. Going, (Mann, Hayes, & Miller, of counsel), for appellee.

WILKIN, J. (after stating the facts). This is, in effect, an attempt to specifically enforce a contract by injunction. It is said in Pom. Eq. Jur. § 1341: "An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrine and rules. It may be stated, as a general proposition, that, whenever the contract is one of a

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class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit." Unless, therefore, the contract upon which the relief here sought is based is one which a court of equity would, if called upon to do so, specifically enforce between the parties, the demurrer was properly sustained by the circuit court. It has been often said by this and other courts that courts of chancery will exercise a sound legal discretion, in view of all the terms and conditions of a contract, as well as the surrounding facts and circumstances, in determining whether it will specifically enforce such contract or not. We regard it as perfectly clear that no such rights are shown by the complainant, by its bill in this case, as entitle it to invoke the aid of a court of chancery to enforce the contract between it and the defendant, for the reason that, as appears upon its face, the contract is illegal and void, as against public policy. Counsel for appellant, in their argument, attempt to separate that part of the contract which relates to the crossings at Ninety-First and Ninety-Second streets from that part which pertains to making future grade crossings, and insist that the first is not only not against public policy, but clearly in the public interest, and to that extent, at least, should be enforced, and that, as to the latter part, it was not so far against public policy as to render it void; the position, as we understand it, being that, even though the latter part of the agreement should be held void, still the former should be sustained. We do not think that contention could be maintained as to the crossings at Ninety-First and Ninety-Second streets, even if the contract should be held divisible. We are, however, unable to see upon what principle this agreement between the parties can be held valid in part unless it is valid as a whole. *Henderson v. Palmer*, 71 Ill. 579. Nor do we understand that the bill proceeds upon any such theory. The contract is an entirety

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that part of it relating to future crossings being in consideration of the contract for grade crossings at the places named. It will be sufficient, therefore, to determine whether or not the contract, as a whole, is one which a court of equity can be called upon to enforce.

It sufficiently appears from the bill that these corporations were, at the time the contract was entered into, rivals for public patronage in that part of the city in which their lines were located. Under their organization, they owed the duty to the public to use their respective franchises unrestrained by contract; and any agreement between themselves, or with others, which tended to prevent the discharge of that duty, is violative of the public right, and void. The duty which they owed to the public could not be "avoided by neglect, refusal, or by agreement with other persons or corporations." *Peoria & R. I. Ry. Co. v. Coal Valley Min. Co.*, 68 Ill. 489. It is not denied that the municipality has the exclusive right, in the control of its streets, to determine upon what grade the street-car lines should cross each other. These companies, when they entered into the contract in question, knew that the city of Chicago would not, generally, at least, permit street-railway tracks to cross each other except at grade; and hence the agreement can reasonably be considered as no more nor less than a contract that they would not cross each other's tracks at all; and that is, in effect, an agreement that neither company shall invade the territory occupied by the other, even though both the interest of the corporation and the public convenience might require it to be done. Whatever tends to prevent competition between such companies, and create a monopoly in their hands, is against public policy. *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. 169; *People v. Chicago Gas-Trust Co.*, 130 Ill. 268, 22 N. E. 798. In *Bestor v. Wathen*, 60 Ill. 138 (the action being by bill in equity to enforce a contract to lay off a town upon certain land), it was said (page 140): "When the people, through the legislature, grants to a company

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the right of eminent domain, for the purpose of constructing a railway, the grant is made because it is supposed the road will bring certain benefits to the public. When the company is incorporated, and subscriptions are made to the stock, the money is subscribed upon the understanding that the officers intrusted with the construction of the road will so locate its line and establish its depots as to bring the highest pecuniary profit to the stockholders compatible with a proper regard to the public convenience. These, and these alone, are the considerations which should control the action of the president and directors of the road; and, so far as they permit their official action to be swayed by their private interests, they are guilty of a breach of trust towards the stockholders, and of a breach of duty to the public at large." It was also held in *Marsh v. Railway Co.*, 64 Ill. 414, that equity would not enforce the specific performance of a contract on the part of a railroad company to locate a depot at a particular point, and at no other, in a town,—the enforcement of such a contract being regarded as against public policy; and it was again said: "The specific execution of a contract in equity is a matter not of absolute right in the party, but of sound discretion in the court; and, in deciding whether specific performance should be enforced against a railway company, the court must have regard to the interest of the public;" citing *Raphael v. Railway Co.*, 2 L. R. 2 Eq. 37. To the same effect is *Railroad Co. v. Mathers*, 71 Ill. 592.

It seems to be thought by counsel for appellant that as the defendant company was, at the time of entering into the agreement, under no duty to extend its lines across appellant's track, and could not be compelled thereafter to do so, therefore the contract was not illegal. This position we regard as wholly untenable. The interest of these companies, and the interest of the public, to have the street-car lines extending as the demand therefor should arise, are the same. One or both of the companies would, in its own interest,

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furnish such additional facility for travel as the public necessity required,—just as the defendant has done, as shown by this bill. Any contract which tended to deprive the public of that benefit is clearly violative of the public right, against public policy, and void. The principle is that such corporations shall not bind themselves by contract not to serve the public interest as the demand arises. To say the defendant was not bound to extend its lines, though it might be necessary to do so to serve the public convenience, is one thing; but to say that it shall not do so, because of the binding force of its contract with an individual or corporation, is quite another, and very different, thing. *Doane v. Railway Co.*, 160 Ill. 22, 45 N. E. 507, sustains the principle here announced. It may be said that neither of these street-car companies was at the time legally bound to extend its tracks, and, on the theory here contended for, the public would, during the entire period of the existence of the contract, be deprived of necessary facilities for street-car travel, however great might be that necessity, and however much the company might desire or be inclined to furnish that facility. The bill stated no ground for equitable relief, and was properly dismissed. The judgment of the appellate court will accordingly be affirmed. Judgment affirmed.

NOTE.

Contracts Between Railroads to Prevent Competition.—Contracts between rival railroads to prevent competition will not be enforced: *Wiggins Ferry Co. v. C. & A. R. R.*, 5 Mo. App. 347, 73 Mo. 389; *Hartford R. R. v. New Haven R. R.*, 3 Rob. (N. Y.) 411; *Peoria and Rock Island R. R. v. Mining Co.*, 68 Ill. 489, 12 Am. Law Reg. (N. & S.) 284, *note*; *Shrewsbury R. R. v. London R. R.*, 17 Jur. 845; *Pearce v. Peru R. R.*, 21 How. 441; but, on the contrary, may be restrained, *State v. Hartford R. R.*, 29 Conn. 538; *People v. Albany R. R.*, 24 N. Y. 261; or between a railroad and express company, *Sanford v. R. R. Co.*, 24 Pa. St. 378; *New England Ex. Co. v. Maine R. R. Co.*, Me. 188; *Southern Ex. Co. v. Nashville R. R. Co.*, 20 Am. Law Reg. (N. S.) 590, 602, *note*; *McDuffee v. Portland R. R.*, 52 N. H. 430; *Texas Ex. Co. v. Texas R. R. Co.*, 6 Fed. Rep. 426; so, between manufacturers, *Central Salt Co. v. Guthrie*, 53 Ohio St. 666; *Hilton v.*

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Eckersley, 6 E. & B. 47; India Bagging Ass'n. v. Kock, 14 La. Ann. 168; or producers and dealers, Morris Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Clancey v. Onondaga Salt Co., 62 Barb. 395; Craft v. McConoughy, 79 Ill. 346; Arnot v. Pittston Coal Co., 2 Hun 591, 68 N. Y. 558; Crawford v. Wick, 18 Ohio St. 190; Raymond v. Leavitt, 46 Mich. 447; or proprietors of boats, Stanton v. Allen, 5 Denio, 434; Pratt v. Tapley, 3 Pugs. 163; Hooker v. Vandewater, 4 Denio 349; Anon., 2 Wart. Prec. *658; Murray v. Vanderbilt, 39 Barb. 140. See Palmer v. Stebbins, 3 Pick. 188; Collins v. Locke, L. R. (4 App. Cas.) 674; Jones v. Fanning, Morris 348, or of two lines of stages, Bennett v. Dutton, 10 N. H. 481; or a railroad company and a ferry company, Lyde v. Eastern R. R. Co., 36 Beav. 10; or a railroad company and a stage-owner, Marriot's Case, 1 C. B. (N. S.) 499. See Parker v. Great Western R. R., 11 C. B. 545; Wiswall v. Greenville Co., 3 Jones Eq. 183; or a railroad company and parlor car company, Pullman Palace Car Co. v. Texas and Pacific Co., 11 Fed. Rep. 625, and 632, note; or a railroad company and telegraph company, Western Union Co. v. Union Pacific Co., 3 Fed. Rep. 1; Western Union Co. v. St. Joseph R. R., *Id.* 430; Western Union Co. v. American Union Co., 65 Ga. 160; Atlantic & Pac. Co. v. Union Pac. R. R., 1 Fed. Rep. 745; Western Union Co. v. Burlington Co., 11 Fed. Rep. 1, 10, note; Western Union Co. v. Kansas Pac. R. R. Co., 4 Fed. Rep. 284; or injurious discriminations in the delivery or transportation of freight, Rogers Loco. Works v. Erie R. R. Co., 5 C. E. Gr. 379; Chicago & N. W. R. R. v. People, 56 Ill. 365; Crouch v. London & N. W. R. R., 14 C. B. 255; Garton v. Bristol R. R., 6 C. B. (N. S.) 639; Pickford v. Grand Junction R. R., 10 M. & W. 399; McDuffee v. Portland R. R., 52 N. H. 430, 455; Twells v. Pa. R. R. Co., 4 Am. Law Reg. (N. S.) 728, 733, note; Union Locomotive Co. v. Erie R. R. Co., 8 Vr. 23; David v. Western Union R. R., 1 Cin. S. C. 100. See Fitchburg R. R. v. Gage, 12 Gray, 393; Baxendale v. Great Western R. R., 5 C. B. (N. S.) 309; Chicago R. R. v. Parks, 18 Ill. 460; Munhall v. Pa. R. R. Co., 92 Pa. St. 150; Morris and Essex R. R. v. Sussex R. R., 5 C. E. Gr. 543; Stewart v. Lehig Valley R. R. Co., 9 Vr. 505.

A contract between a railroad company and a telegraph company, whereby the former agreed to give the latter the exclusive right of way for telegraphic purposes, so far as it legally might, and to discourage competition, was held not void: Western Union Tel. Co. v. Chicago & P. R. R., 86 Ill. 246; Western Union Co. v. Atlantic & Pac. Co., 7 Biss. 367; so, of a contract by an individual not to run, own or be interested in any line of packet boats on the Erie canal, Chappel v. Brockway, 21 Wend. 157; or not to run boats on a certain line of travel, California Nav. Co. v. Wright, 6 Cal. 258; Oregon Nav. Co. v. Winsor, 20 Wall. 64; Dunlop v. Gregory, 10 N. Y. 241; but see Wright v. Ryder, 36 Cal. 342; or a stage-coach, Pierce v. Fuller, 8 Mass. 223; Hearn v. Griffin, 2 Chit. 407; or to furnish recruits for an army, Marsh v. Russell, 66 N. Y. 288; see Skeels v. Phillips, 54 Ill. 309; or to keep a hotel, Mossop v. Mason, 16 Grant's Ch. 302, 17 *Id.* 360, 18 *Id.* 453; McAlister v. Howell, 42 Ind. 15; Hooper v. Broderick, 11 Sim. 47; or a school, Spier v. Lambdin, 45 Ga. 319; or not to start a rival newspaper, Beal v. Chase, 31 Mich. 490. See Presbury v. Fisher, 18 Mo. 50; or to carry newspapers, Fallon v. Chronicle Co., 1 Mac-Arth. 485; or a contract between a railroad and an elevator company that the latter should handle all through grain

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exclusively, *Richmond v. Dubuque R. R.*, 33 Iowa, 422; as to trades-unions, see *Master Stevedores Ass'n. v. Walsh*, 2 Daly 1; *Snow v. Wheeler*, 113 Mass. 179; *People v. Fisher*, 14 Wend. 9; *Leather Cloth Co. v. Lorscheint, L. R.* (9 Eq.) 345; *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr. 168; *State v. Donaldson*, 3 Vr. 151; *Rex v. Batt*, 6 C. & P. 329; *Wallsby v. Anley*, 3 El. & El. 516.

See, further, 1 *Smith's L. C.* 172; *Avery v. Langford, Kay*, 663; *Gravelly v. Barnard*, 10 Moak 836.

PEOPLE

v.

DETROIT CITIZENS' ST. RY. CO. *et al.*

(*Supreme Court of Michigan, March 15, 1898.*)

Street Railways—Franchises—Subsequent Ordinance—Penalties.—A city has a right to impose a penalty upon a street-railway company for a violation of an ordinance requiring the company to furnish a certain number of cars for the accomodation of the public on a certain street.

Same—Municipal Regulation of Street Railways*—Subsequent Ordinance.*—Where a street-railway company has accepted a franchise to operate its railway in certain streets under an ordinance requiring the company to run cars at certain intervals, the city may, after the company has adopted other motive power than horse power, the use of such motive power being contemplated when the franchise was granted, require the company, by a subsequent ordinance, to run cars at such intervals as the needs of the public may require, although its franchise under the prior ordinance has not expired.

City Council—Good Faith.—It cannot be presumed that the members of a city council are actuated by improper motives.

Same—Remedies.—If the subsequent ordinance proves to be oppressive, and the city council refuses relief, the judicial power may be invoked; but before doing so the effect of the ordinance must be reasonably tested.

CERTIORARI by Street-Railway Co. to recorder's court of Detroit. *Affirmed.*

Brennan, Donnelly & Van De Mark and Bernard B. Selling, for appellants.

C. D. Joslyn, for the People.

*See note at end of case.

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MOORE, J. Mr. Hutchins is vice president and treasurer of the Detroit Citizens' Street-Railway Company, a corporation operating a line of street railways in the city of Detroit. In February, 1897, the common council of the city adopted an ordinance requiring the street-railway company to "provide sufficient cars upon Gratiot avenue so that a six-minute service shall be given upon said avenue between Mack and Sheridan avenues between the hours of five thirty a. m. and ten p. m." Section 3 of the ordinance reads as follows: "Sec. 3. Any violation or failure to comply with the provisions and requirements of this ordinance shall be punished by a fine of not to exceed three hundred dollars; and said fine, when so imposed, may be recovered from the person or corporation so convicted in an action of law, in the proper court." The company did not comply with the terms of this ordinance. A complaint was made in the recorder's court for the city of Detroit against Mr. Hutchins, as vice president and treasurer, and the railroad company. They were convicted under the direction of the court, and a writ of *certiorari* has been issued to review the proceeding here.

To discuss the questions involved intelligently, it is necessary to make quite a complete statement of what is shown in the record. In 1862 a number of gentlemen proposed to organize a corporation under the provisions of an "Act to provide for the construction of train railways" (Laws 1855, p. 338). The common council passed an ordinance which was approved November 24, 1862, granting to them a franchise to operate a railway in certain streets in the city of Detroit. The ordinance contained these provisions: Section 7: "The cars to be used on said railways shall be drawn by animals only, at a speed not exceeding the rate of six miles per hour and shall be run as often as public convenience shall require, and the common council shall prescribe: provided always that said council will not require them to run regular cars oftener than once in

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twenty minutes during fourteen hours every day, from the fifteenth day of April to the fifteenth day of October, and twelve hours every day from the fifteenth day of October to the fifteenth day of April. * * *” Section 19: “It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accomodation of the public in relation to said railways.” Section 20: “The powers and privileges conferred by the provisions of this ordinance shall be limited to thirty years from and after the date of its passage.” In November, 1879, an ordinance was adopted by the council containing, among others, the following provisions: Section 4: “On the 1st of July and January in each half year from the first of January, 1880, the Detroit City Railway Company shall pay to the treasurer of the city of Detroit a tax of one per cent., during the period of this ordinance, on the gross receipts of the several lines of street railway operated by said company,” etc. “The foregoing special tax and undertaking as to paving shall be in lieu of license and other taxes and charges for paving under existing ordinances. And it is hereby stipulated and agreed that the cars on all lines subject to this ordinance shall be operated as the public convenience may require and the common council order.” Section 5: “The powers and privileges conferred and obligations imposed on the Detroit Railway Company by the ordinance passed November 24, 1862, and the amendments thereto, are hereby extended and limited to thirty years from this date. * * *” Section 6: “This ordinance shall take immediate effect when written acceptance of the terms thereof are filed in the office of the city clerk of Detroit by the Detroit City Railway Company, the Detroit & Grand Trunk Junction Street-Railway Company, and the Central Market, Cass Avenue & Third Street-Railway Company, or their successors; and from that date all ordinances, in conflict with the provisions hereof, shall stand repealed; and all ordinances and

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parts of ordinances not in conflict herewith are hereby affirmed and continued in force." It is by virtue of the ordinances mentioned that the street-railway company is operating its line of road to-day.

On the trial it was shown on the part of the railway that the Michigan-Gratiot line of its system runs from the end of Michigan avenue, across the city, out Gratiot avenue. Upon this track, from Trumbull avenue to Chene street, the Trumbull-Chene street line also runs ; so that from the intersection of Trumbull and Michigan avenues to the intersection of Chene street and Gratiot avenue there is a double service on the line. On both the Chene-Trumbull and the Michigan-Gratiot lines is a six-minute service, so that from Trumbull avenue to Chene street the cars run every three minutes. After the Chene street cars leave the Gratiot avenue track, from that point out there is again a six-minute service on the Michigan-Gratiot line, which six-minute service continues as far as Mack avenue. From that point, one half of the cars of the Gratiot avenue line go out Mack avenue, and the other half continue out Gratiot avenue as far as the loop, which is a little beyond Sheridan avenue. This gives a 12-minute service on Mack avenue, and also a 12-minute service on Gratiot avenue from Mack to Sheridan avenues. From 5:30 to 7 a. m., and from 5:15 to 6:15 p. m., cars are run every 6 minutes on Gratiot avenue from Mack to Sheridan, and cars from Mt. Clemens run by the Rapid Railway come down and go up Gratiot avenue every 30 minutes. It is the claim of the railway company that there is not sufficient travel beyond the junction of Mack and Gratiot avenues to make it necessary to put on cars more frequently than they now run them. They also claim that to give the service required by the ordinance of 1897 would involve an annual expenditure of about \$50,000. It is the claim of the people, in view of the settled condition of that part of Detroit, beyond the junction of Mack and Gratiot avenues, there is need of a six-minute service to comply with the reasonable demands of the public, and that the six-minute service would not be nearly as expensive

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as claimed by the railway company, and that even if it was expensive, and that some of the cars could be run out Mack avenue and return only to Gratiot, the cost would not be a reason why they should not comply with the ordinance. Proof was introduced on the part of the respondent to the effect that during a portion of March, after the ordinance went into effect, they caused the number of passengers carried by their cars on Gratiot avenue, at a point just beyond the junction with Mack avenue, to be counted, and the average was a trifle more than 7 persons to the car during the 12-minute service, and 13 during the 6-minute service. To get this average, the car service both ways was included.

Counsel for respondent in their briefs say: "There are practically but three questions in this case; * * *

(1) Has the common council of the city of Detroit the power, under its police regulations, to pass the ordinance upon which the complaint is based? (2) Has the common council the power to pass this ordinance under its contract with the railway company? (3) Is the ordinance reasonable?"

In our view of the law, it will not be necessary to discuss at length the first question. It is claimed that,

Street Railways—
Franchises—Sub-
sequent Ordinance
—Penalties.

unless the ordinance is passed by virtue of the police power of the council, the recorder's court has no jurisdiction. It may be well to say that if, under the contract relations existing between the city and the company, the former had the right to pass the ordinance of 1897, the common council had a right to provide a penalty for its violation. This right is expressly conferred by section 257 of the charter. Section 259 confers upon the recorder's court, authority to try persons charged with violation of the ordinances of the city.

Passing to the second question. It is said by counsel that, under the franchise held by the railway com-

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pany, the city had no right to pass the ordinance of 1897. It is said the ordinances of 1862 and 1879 constitute a contract between the city and the street-railway company, and that "the ordinance of 1879 was not a new grant

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or a new consent; it was confessedly an extension of the old grant of consent, upon the terms and conditions of the old consent, except in so far as these terms are readjusted,"—citing *Detroit Citizens' St. Ry. Co. v. City of Detroit*, 22 U. S. App. 570, 12 C. C. A. 365, and 64 Fed. 628. It is now urged that as the city agreed, by the provisions of section 7 of the ordinance of 1862, not to require the company "to run regular cars oftener than once in twenty minutes during fourteen hours every day, from the fifteenth day of April to the fifteenth day of October, and twelve hours every day from the fifteenth day of October to the fifteenth day of April," by reason of its contract with the company the city cannot now require the company to run cars oftener than once in 20 minutes. All of these provisions in the various ordinances, so far as they appear in the record, relating to the frequency which cars shall be run, the rate of speed, and the motive power allowed, have already been quoted. In construing these ordinances, it may be worth while to inquire into the situation when they were passed. Detroit, in 1862, was a city of about 50,000 people. Its residents all lived within a comparatively short distance of the business center. A street railway was comparatively unknown. It was yet in an experimental stage. No more practical method of furnishing motive power was known than the use of animals. It was believed that a speed not exceeding 6 miles an hour, and cars run not more frequently than 3 times an hour, for 14 hours in the day part of the year, and 12 hours a day for the remainder of the year, would answer the convenience and demands of those who were likely to be patrons of the road. The franchise conferred by the ordinance of 1862 would end by its terms in 1892. In 1879 the population of the city was upward of 100,000 people, and the city was growing rapidly. Street-railway systems were no longer experiments. A franchise like that conferred by the ordinance of 1879, in a city like Detroit, was known to be an exceedingly valuable thing. The ordinance of 1879, by its terms, gave the company a fran-

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chise for 30 years. Improved methods of motive power were coming into vogue. Portions of the residence part of the city were much further from the business center than in 1862. The public demanded quicker and more frequent service then than it had earlier. Is it likely that, under such circumstances, the council would confer a franchise for 30 years over the principal streets of a great and growing city, with a limitation that the city should not require the running of cars oftener than 3 times an hour, and not at all for 10 hours of the day for part of the year, and 12 hours a day for the remaining portion of the year? On the other hand, is it probable the railway company would be willing to accept an ordinance running for 30 years which limited it to the use of animal power in the transportation of its cars, and to a speed of six miles an hour? We think this contention is unreasonable, and that the ordinance of 1879 was given and accepted with the understanding of all parties to it that the provision in section 4 "that the cars on all lines subject to this ordinance shall be operated as the public convenience may require and the common council order" should control.

Is the ordinance reasonable? Who shall determine. It is evident that, when the provisions of the ordinance ceased to direct how frequently the cars should run, the parties to the ordinance understood that, in the first instance, the common council should decide. It is urged that the interests of the company and the public are identical, and that the frequency with which the cars shall be run can safely be left to the company. It is sufficient reply to this suggestion to say the ordinance does not so provide. It is said, in substance, if the power is lodged with the common council, the chances are that the public interests would not be subserved, but private spites and hatreds gratified, and that a corrupt common council may sap the life blood of industries in cities unless the corporations "see" the members of the council. We cannot presume that members of a common council are actuated by improper motives, or that

City Council—
Good Faith.

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their actions towards corporations are actuated by improper motives. But, if this was conceded, there would be two remedies: First. The aid of the criminal law should be invoked to punish alike the members of the council whose official acts are influenced by corrupt means, and the corporation which makes use of the corrupt methods to improperly influence official action. The second remedy is for the people to elect honest members to the common council. It may be assumed, in the very nature of things, that the members of the common council are acquainted with the city, the number and direction of the streets, the density of its population, the need of quick transportation, and how well the need is supplied. They ought to be men, too, who would stand impartially between the people whom they represent and the corporations to whom franchises have been granted, and to respect the rights of both. The common council acts as the public and municipal agent, and, in the passage of an ordinance affecting subjects of municipal administration, it should and will be presumed that the council acted in the exercise of a judgment upon the facts, and their judgment must control until it has been shown that it has been improperly exercised. Mayor, etc., of New York v. Dry-Dock, E. B. & B. R. Co., 133 N. Y. 104, 30 N. E. 563. We have no doubt, if it was clearly made to appear that the action of the council was capricious and arbitrary, or that the public convenience did not require the provisions contained in the ordinance, that the courts might intervene. It is not made to appear that the action of the common council is unreasonable, especially if stub trains are allowed to be run from the junction of Gratiot and Mack avenues, out Mack avenue, which should be allowed if the company so desires. Until the company has given the provisions of the ordinance a trial, no one can say the provisions are unreasonable. This the company should be required to do. The judgment of the court is affirmed, and the case is remanded for further proceedings. The other justices concurred.

Same—Remedies

NOTE

Municipal Regulation of Street Railways.—The general rule is that a grant to a corporation of a franchise to own property and to erect a street railroad affords no immunity from any police control by the city to which a private citizen could be subjected, except in so far as its charter contract protects it from unreasonable and unnecessary imposition. *Trenton Horse R. Co. v. Trenton*, 53 N. J. L. 132; *Frankford, etc., R. Co. v. Philadelphia*, 58 Pa. St. 119, 98 Am. Dec. 242; *San Jose v. San Jose, etc., Co.*, 53 Cal. 475; *City of Wyandotte v. Corrigan*, 35 Kan. 21; *People v. Chicago, etc., R. Co.*, 118 Ill. 113, 25 Am. & Eng. R. Cas. 258; *Clinton v. Clinton, etc., Horse R. Co.*, 37 Iowa 61. See *New York v. Dry-Dock, etc., R. Co.*, 50 Am. & Eng. R. Cas. 438, 133 N. Y. 104, 113, *reversing* 15 N. Y. Supp. 297, for a particular instance of ordinance regulating the number of cars to be operated during certain hours of the day. The question as to the reasonableness of such ordinances was, it was said, not to be controlled by considerations of expense to the company.

In an action against a street-railway company to recover a penalty for the violation of a city ordinance requiring it to run cars at certain intervals during certain hours of the night, the defendant is entitled to show that as to it such ordinance is unreasonable, and may give evidence of such facts as will establish, or tend to establish, that the public convenience does not require the running of its cars during the hours specified. The fact that the evidence offered relates to a period of time subsequent to the date when the ordinance went into effect is not a ground for objection. Nor is the question of the reasonableness of such ordinance controlled by considerations of the expense to the defendant. *Mayor, etc., of N. Y. v. Dry-Dock, E. B. & B. R. Co.*, 50 Am. & Eng. R. Cas. 438, 133 N. Y. 104, 30 N. E. Rep. 563, 44 N. Y. S. R. 94; *reversing* 39 N. Y. S. R. 105, 15 N. Y. Supp. 297.

The charter under which defendant operates its street railroad (N. Y. Laws of 1860, ch. 512) provides that said railroad "shall be run as often as the convenience of passengers may require and shall be subject to such reasonable rules and regulations in respect thereto as the common council of the city of New York may from time to time by ordinance prescribe." The common council passed an ordinance requiring street surface railroads to run "not less than one car every twenty minutes between the hours of twelve midnight and six o'clock a. m., each and every day, both ways, for the transportation of passengers." *Held*, in an action to recover the penalty prescribed for a violation of the ordinance, that while the authority of the common council was qualified as to defendant, and an unreasonable regulation would not be obligatory upon it, the presumption was in favor of the reasonableness of the ordinance, and the burden was upon it to show the contrary. *Mayor, etc., of N. Y. v. Dry Dock, E. B. & B. R. Co.*, 50 Am. & Eng. R. Cas. 438, 133 N. Y. 104, 30 N. E. Rep. 563, 44 N. Y. S. R. 94; *reversing* 39 N. Y. S. R. 105, 15 N. Y. Supp. 297.

Ordinances of the mayor and common council of the city of Hoboken prescribing the mode and times of running horse cars through the streets of said city by any corporation which has laid rails for the purpose of running horse cars thereon, *held* invalid against the prosecutors, holding under their charter and also under anterior rights derived from the Bergen Turnpike Co., such company having the right to lay rails through the city without the consent of the city council. *State v. Council of Hoboken*, 30 N. J. (1 Vroom) 22

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CITY OF BOSTON

v.

BOSTON & A. R. Co.

(*Supreme Judicial Court of Massachusetts, Jan. 8, 1898.*)

Taxation of Right of Way for Public Improvements.*—The roadbed of a railroad company is exempt from special assessments for public improvements, because it is public property, though profits are derived from it by the company.

Same.—And the provision of the special statute of Massachusetts, authorizing such improvement, that in case any of the land along the line of the projected improvement is devoted to public use, the city making such improvement may assume and pay the whole or part of the amount assessed thereon, if it should deem proper to do so, does not render the right of way of a railroad company liable to such assessment, there being several material provisions of the statute inapplicable to land occupied as a right of way.

Same.—And such assessments are only justifiable upon the ground of a special benefit to the land assessed, covered by the improvement, and the construction of a sidewalk in a public street along the roadbed of a railroad company will not warrant such an assessment upon such roadbed.

Same.—And the special statute of Massachusetts which provides that the collector of taxes of the city making the improvement shall suspend the collection of a special assessment upon land exempt from taxation until such exemption ceases to apply thereto, is as applicable to an exemption existing under general principles of law as to one under a statutory provision.

Samuel H. Child, for plaintiff.

Samuel Hoar, for defendant.

KNOWLTON, J. This is an action to recover three assessments made upon portions of the roadbed of the defendant to pay the cost of public improvements near the premises upon which the assessments were made. The assessments were laid at different times, under different statutes,—two of them to pay the cost of construction of sidewalks in public streets, and one to pay for the construction of a sewer. Although there

Case Stated.

*See note at end of case.

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is some diversity in the statutes under which the work was done, the general principles applicable to the different claims are the same. The making of such assessments is a form of taxation, which rests upon the ground that the property in the neighborhood of a public improvement may receive special and peculiar benefits from the improvement, that make it equitable as against its owner, to charge it with the payment of a greater proportional part of the cost of the work than is paid by property owners generally. *Dorgan v. Boston*, 12 Allen, 223; *Harvard College v. Boston*, 104 Mass. 470; *Codman v. Johnson*, *Id.* 491. It is well-established law in Massachusetts that the land of a railroad corporation lying within its location, not exceeding five rods in width, and used for the purposes for which the corporation is established, is exempt from taxation. *Inhabitants of Worcester v. Western R. Corp.*, 4 Metc. (Mass.) 564; *City of Charlestown v. County Com'rs of Middlesex Co.*, 1 Allen, 199; *Boston & M. R. R. v. Lowell & L. R. Co.*, 124 Mass. 368; *Norwich & W. R. Co. v. County Com'rs*, 151 Mass. 69, 23 N. E. 721. This rule is founded on the nature of the use for which the land is taken or purchased. The land is appropriated to a public use in

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much the same way as is a highway, or the land under a court house or school house or jail. Although the corporation is permitted to derive profit from it, this is incidental to the main purpose for which it is taken in the exercise of the right of eminent domain. The fundamental fact on which the rights of the corporation depend is that a public highway is being prepared for the use and convenience of all the people. The reason of the rule is as applicable to special taxation for local improvements particularly affecting only a small neighborhood near the railroad as to general taxation. It is that property held and used for the benefit of the public should not be made to share the burden of paying public expenses. The rule has often been applied to special taxation in this commonwealth, as well as to

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general taxation. *Worcester Co. v. Mayor, etc.*, of Worcester, 116 Mass. 193; *Mount Auburn Cemetery v. City of Cambridge*, 150 Mass. 12, 22 N. E. 66; *Harvard College v. Boston*, 104 Mass. 470; *Codman v. Johnson*, *Id.* 491. The rule is different from that which applies to statutory exemptions of property in a scheme for general taxation, which are held to cover only taxes that are assessed under and in accordance with the scheme created by the statute. *Boston Seamen's Friend Soc. v. City of Boston*, 116 Mass. 181; *Worcester Agricultural Soc. v. City of Worcester*, *Id.* 189. In cases of the latter kind, an examination of the statute to discover the intention of the legislature shows that the principal reasons for exemption do not extend beyond the system of general taxation with which the legislature is dealing. But the exemption of property appropriated to a public use is not founded upon an express provision of any statute, but rests upon general principles of propriety, justice, and expediency which are applicable alike to every kind of taxation. In *Inhabitants of Worcester Co. v. City of Worcester*, 116 Mass. 193, it was held that assessments made for betterments could not be laid upon the court house of the county and the lot on which it stands; and in *Mount Auburn Cemetery v. City of Cambridge*, 150 Mass. 12, 22 N. E. 66, a similar decision was made in regard to assessments upon land of a cemetery corporation to pay the expense of constructing a sewer. The general doctrine of these cases covers the case at bar. Similar decisions, varying somewhat in their facts and in the reasons on which they are said to rest, have been made in other states. *City of Philadelphia v. Philadelphia, W. & B. R. Co.*, 33 Pa. St. 41; *Morris & E. R. Co. v. Jersey City*, 36 N. J. Law, 56; *New Jersey R. & T. Co. v. City of Elizabeth*, 37 N. J. Law, 330; *New York & N. H. R. Co. v. City of New Haven*, 42 Conn. 279; *New York & H. R. Co. v. Town of Morrisania*, 7 Hun, 652; *Junction R. Co. v. City of Philadelphia*, 88 Pa. St. 424; *Allegheny City v. Western Pa. R. Co.*, 138 Pa. St. 375, 21 Atl. 763;

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Sweaney v. Kansas City Ry. Co., 54 Mo. App. 265; Chicago, M. & St. P. Ry. Co. v. City of Milwaukee, 89 Wis. 506, 62 N. W. 417; Detroit, G., H. & M. Ry. Co. v. City of Grand Rapids, 106 Mich. 13, 63 N. W. 1007; City of Bloomington v. Chicago & A. R. Co., 134 Ill. 451, 26 N. E. 366.

It remains to consider certain special provisions of the different statutes under which the assessments in this case are made. The assessment described in the first part of the agreed statement of facts was for the construction of a sidewalk under St. 1892, c. 401. Section 2 of this chapter is as follows: "Any expenses incurred for any work so ordered and performed shall be paid out of the moneys appropriated under the provisions of section 1 of chapter 323 of the Acts of the Year 1891, and shall be repaid to said city as the assessable cost of the work by the owners of the several parcels of land bordering on the part of the highway along which the sidewalk is made: provided, however, that if any such parcel is devoted to public use, said city may assume and pay the whole or part of the amount assessed thereto, if said city deem proper so to do." It is contended that the language of the proviso is a legislative declaration that all lands devoted to a public use are assessable under this statute. We are of opinion that it was not the intention of the legislature by this statute to change the general provisions of law applicable in like cases to lands used by counties, cities, towns, and railroad or other corporations for a public use, in such a sense that the lands could have been taken for that use by right of eminent domain. There are several provisions of the statute which would be inapplicable to such lands. In the first place, a lien is created upon the lands for the amount assessed, and the assessment may be collected by a sale of the property. But such property is so held and used that a sale of it would be inconsistent with general principles of law, and with the statutes under which it was acquired. The provisions of St. 1891, c. 323, §§ 16-18,

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are made applicable to these assessments which call for a subdivision of an assessment into 10 equal amounts, to be added for 10 years to the annual tax bills upon the railroad if the assessment is not paid before the last day of September next succeeding the assessment, and which require these amounts to be subdivided and apportioned upon different parcels of the land if it becomes divided in ownership. These provisions cannot be applied to such property as we are considering. There are no annual tax bills issued for taxes on such lands, and it is impracticable to collect the subdivided assessments in the manner contemplated. The legislature never intended that a short section of a railroad, adjacent to a public street, should be subject to sale for the payment of such a tax.

Another vital objection to the contention is that taxes of this kind can only be assessed on the ground of special benefit to the property, and then only to the amount of the benefit. *Dorgan v. Same.* Boston, 12 Allen, 223; *Holt v. Summerville*, 127 Mass. 408, 412; *Hammett v. City of Philadelphia*, 65 Pa. St. 146; *Dyar v. Corporation*, 70 Me. 515-527; *Chamberlain v. City of Cleveland*, 34 Ohio St. 551-562; *Chicago, M. & St. P. Ry. Co. v. City of Milwaukee*, 89 Wis. 506-515, 62 N. W. 417. It has been held in different jurisdictions that, to land used for railroad purposes within the location of a railroad, there is no benefit of the kind contemplated by the laws relating to such assessments. *City of Philadelphia v. Philadelphia, W. & B. R. Co.*, 33 Pa. St. 41; *Junction R. Co. v. City of Philadelphia*, 88 Pa. St. 424; *New York & N. H. R. Co. v. City of New Haven*, 42 Conn. 279. In the case at bar it is difficult to see how the construction of the sidewalk in the public street can benefit the land of the defendant for the purpose for which it is held and used. We are of opinion that this proviso in the statute, which is merely permissive, does not imply that land so held and used is subject to this kind of special taxation, and that the implication goes no further than to suggest that the use to which real estate is put by some of the

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corporations which are exempt from taxation under Pub. St. c. 11, § 5, is in a sense public. As we have already seen, the property of such corporations is not exempt from special taxation of this kind, and the statute permitted the city to assume and pay assessments laid upon their property if it deemed it proper so to do.

The assessment referred to in the second division of the agreed statement of facts was for the construction of a sidewalk under St. 1893, c. 437, which repealed St. 1892, c. 401, that we have just been considering. This later statute calls for no special discussion. It provides for assessing upon the abutters one-half of the expense of constructing side walks, and makes the assessment a lien upon the abutting lands. It contains no proviso like that in the earlier statute.

The third assessment was for the construction of a sewer under St. 1892, c. 402. This statute makes the expense of constructing a sewer, to an amount not exceeding four dollars for each lineal foot of sewer, assessable upon the owners of adjacent lands, and creates a lien upon the land for the payment of it. Certain sections of St. 1891, c. 323, as amended by St. 1892, c. 402, are made applicable to the collection of the assessments. Section 4 is as follows: "When an assessment is made for a parcel of land for which the owner is by law exempt from being taxed, as determined and certified to by the assessors of said city on application to them therefor, the collector of taxes of said city shall suspend the collection of such assessment, but after the day on which the parcel ceases to be owned by a person or corporation so exempt, the amount of such assessment, less any payment made for an entry under the following section, shall be collected as if that day were the date of the passage of the aforesaid order for making the sewer." This introduced a new provision into the law in regard to special taxation. We are of opinion that the words "parcel of land for which the owner is by law exempt from being taxed" were intended to include land in which the exemption exists under general principles of law, as

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well as land which is exempt by statutory provisions. Construing the language in this way, the defendant's land comes within the description; and, under the facts agreed, the assessors are to be deemed to have made the determination and certification referred to. It follows that collection of the assessment is to be suspended until the land ceases to be owned by a person or corporation exempt from taxation, and the defendant is under no liability to the plaintiff for any of the assessments. Judgment for the defendant.

NOTE.

Validity of Assessment on Right of Way for Local Improvements.—A railroad right of way, running parallel to a street, is assessable for special benefits arising from local street improvements. *Illinois Cent. R. Co. v. City of Kankakee*, (Ill.), 6 Am. & Eng. R. Cas., N. S., 417.

Under a state statute providing "that all property benefited by the improvement shall be assessed to the extent of its proportionate part of the expense thereof," an assessment for street improvements made against a railway company which failed to appear and object to such assessment is valid. *City of New Whatcom v. Bellingham Bay & B. C. R. Co.* (Wash.); 6 Am. & Eng. R. Cas., N. S., 419.

According to some authorities, the track of a railroad company, running parallel and side by side with a street, is liable to be assessed for street improvements as property abutting on the street. *Peru and Indiana R. R. Co. v. Hanna*, 68 Ind. 562. But other authorities deny this on the ground that, as the railroad company holds its track for the passage of trains merely and cannot apply it to other purposes, the improvement of the street cannot possibly serve as a benefit to the company. *Philadelphia v. Phila. W. & B. R. R. Co.*, 33 Pa. St. 41, and mere speculative benefits, such as would result from the clearing away of houses or other obstacles, so as to enable the railroad company to run its trains faster or employ a smaller number of flagmen, does not warrant the assessment. *Bridgeport v. N. Y. & N. H. R. Co.*, 36 Conn. 255.

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v.

CASS COUNTY *et al.**(Supreme Court of North Dakota, June 20, 1898.)*

Taxation—"Roadway" Defined.*—Under section 179 of the constitution of this state, which declared that "the franchise, road

*See note at end of case.

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way, roadbed, rails and rolling stock of all railroads operated in this state shall be assessed by the state board of equalization," etc., the word "roadway" includes, not only the strip of ground upon which the main line is located, but also all ground necessary for the construction of side tracks, turnouts, connecting tracks, station houses, freight houses, and all other accommodations reasonably necessary to accomplish the objects for which the railroad company was incorporated.

Constitutional Questions—Review.—Constitutional questions argued by counsel, but not involved in the case, will not be discussed. (Syllabus by the Court.)

APPEAL by defendant from Cass county district court. *Affirmed.*

Fred B. Morrill, State's Atty., for appellant.
Ball, Watson & Maclay, for respondent.

BARTHOLOMEW, J. Section 179 of the constitution of North Dakota reads as follows: "All property, except as hereinafter in this section provided, shall be assessed in the county, city, township, town, village or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in this state shall be assessed by the state board of equalization at their actual value and such assessed valuation shall be apportioned to the counties, cities, towns, townships, and districts in which said roads are located, as a basis for taxation of such property in proportion to the number of miles of railway laid in such counties, cities, towns, townships and districts." Pursuant to this provision, the state board of equalization, in the year 1896, assessed the plaintiff railroad at a certain sum per mile upon its track mileage in the state, and the assessment so made was duly certified as required by article 18 of chapter 18 of the Political Code, being sections 1331 to 1335, inclusive, of the Revised Codes, by the state auditor to the auditors of the various counties into or through which said railroad runs. The said railroad extends into Cass county, and has its present northern terminus in the city of Fargo, in said county. Within said city it has usual terminal facilities, consisting of pas-

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senger and freight depots, round house, coal sheds, oil and water tanks, ice house, etc., with proper side tracks and spur tracks for reaching the same. Plaintiff's main track in the city of Fargo runs for the most part upon a public street, but it owns a large number of lots, and an unplatted tract of land adjoining or near to its main track, and it claims that it uses all such real property for purposes directly pertaining to the operation of its road. In 1896 the local assessor of the city of Fargo, on whose assessment the city, county, and state taxes are based, proceeded to assess the said lots and the said unplatted tract of land so owned by plaintiff, and the same were placed upon the tax lists and taxes levied thereon. This action was brought to set aside and cancel such taxes on the ground that all of said property had been assessed by the state board of equalization, and that under the constitution the local assessor had no authority to assess the same, said property all being used for railroad purposes and being a part of the roadway of plaintiff. The answer denied that said property was used for railroad purposes, or that it constituted any part of the roadway of plaintiff. There was no other issue made by the pleadings. A trial to the court resulted in a judgment canceling the tax as to a portion of the property, and refusing to cancel it as to the remainder. The court canceled the tax as to the entire lot, where it was shown that any railroad building, or any portion thereof, rested upon such lot, and, where there were no buildings, to such portion of the lots as was necessary to give plaintiff a right of way 50 feet in width on each side of the center line of its side tracks and spur tracks. The round house is situated upon the unplatted tract, and for that and the spur track leading thereto the court allowed six acres of ground as reasonably necessary for its proper use. The tax was canceled upon one lot upon which there was no structure, and which was touched by no right of way, but the use of which was shown to be reasonably necessary in order to enable the public to reach plaintiff's passenger depot with hacks and

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conveyances. The county of Cass appeals from the judgment.

It will be conceded that if the word "roadway," as used in section 179 of the state constitution, includes the property here in controversy, then the state board of equalization must consider the value thereof in arriving at the average

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mileage valuation of the road, and the local assessor would be without authority to assess the same. It becomes important, then, to ascertain the significance of the word "roadway." The same word appears in the same connection in a corresponding section of the constitution of the state of California (section 10, art 13); and in *San Francisco & N. P. R. Co. v. State Board of Equalization*, 60 Cal. 12, 34, the supreme court of that state, in construing this section, said: "The roadway is the right of way, which has been held to be property liable to taxation." And in *City and County of San Francisco v. Central Pac. R. Co.*, 63 Cal. 467, after defining "roadbed," the court say: "The roadway has a more extended signification, as applied to railroads. In addition to the part denominated 'roadbed,' the roadway includes whatever space of ground the company is allowed by law in which to construct its roadbed and lay its track." And this, we think, is the correct and generally accepted definition of the word when used in this connection. While the term "right of way" is generally used to designate the ground upon which a railroad company may lay its tracks and construct its necessary buildings, yet we frequently find the word "roadway" used as synonymous therewith. It follows then that, speaking of geographical extent, whatever is included in the former is also included in the latter.

The case of *Chicago & A. R. Co. v. People*, 98 Ill. 350, arose on the application of a local tax collector for a judgment for taxes against two certain tracts of land belonging to the railroad company, except a strip 100 feet in width extending through the said tracts on which was situated the main line of the road. The evidence

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showed that outside of such strip the tracts contained about 32 acres of ground. One section of the revenue law of that state (Rev. St. 1874, p. 865; § 41) then in force required the railroad company to "make out and file with the county clerks of the respective counties in which the railroad may be located, a statement or schedule showing the property held for right of way," etc. The next section declared: "Such right of way * * * shall be held to be real estate for the purposes of taxation and denominated 'railroad track' and shall be so listed and valued." By other provisions the "railroad track" was assessed by the state board. The court said: "What was intended by the enactment of this section of the statute by the use of the words here employed, 'such right of way'? Were these words intended to mean merely the strip of land a certain number of feet wide, upon which the railroad company had constructed its main track, or did the framers of the section intend to embrace, not only the main line of the road, but all side tracks, turnouts, and switches which are connected with the main track, and which are in actual use by the railroad company as a common carrier? We can see no reason why the term 'right of way' should be confined to the land over which the main track of a railroad should be constructed. The land upon which a side track, a switch, or a turnout is built and in actual use by the company, in the business for which it was organized, for all practical purposes is as much held for right of way as is the land upon which the main track is constructed. In the operation of a railroad it is necessary that trains should pass each other, and hence the necessity of turnouts, switches, and side tracks. In the loading of cars, transfer of cars, the making up of trains, and innumerable other instances that might be named, in the prosecution of its business as a common carrier, side tracks, switches, and turnouts are as indispensable to a proper transaction of its business as the main track itself. We are therefore of the opinion that the land held and in actual use by a railroad company for side tracks, switches, and

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turnouts must be regarded, within the meaning of the revenue law, as a part of the right of way of the company. It is used in the transportation of freight, and also for the purpose of carrying passengers, alike with the land upon which the main track is constructed; and upon what principle the land upon which the main track is laid can be held to be right of way, and the land over which a side track, switch, or a turnout passes can be termed something else, we are at a loss to understand." Further along the court said: "From the evidence, it is manifest that the railroad company has constructed tracks around the entire thirty-two acres of land; that it is covered with side tracks, switches, and turnouts connected with its main track, and in constant use by the railroad company in the prosecution of its legitimate business as a common carrier, for which it was organized under a charter granted by the state. Buildings have been erected on this land by the company, termed 'machine shops,' 'car shops,' 'round houses,' etc., where repairs are made for the company's rolling stock; but this use does not change the character of the manner in which the land is held. It is still held as right of way, notwithstanding such buildings." This is a later case than *Railroad Co. v. Paddock*, 75 Ill. 616, and, if the two are inconsistent, the later case must control, especially as it has been expressly followed and approved in *Chicago & A. R. Co. v. People*, 99 Ill. 464. The Indiana statute relating to the taxation of railroads is practically the same as the Illinois statute already referred to. The case of *Pfaff v. Railroad Co.*, 108 Ind. 144, 9 N. E. 93, involved the same question. The court said: "The important question here is, what is included in the term 'railroad track'? Does that term include the lands described in the complaint being small tracts of land and lots which are occupied by the side tracks, turnouts, round house, a small repair shop, coal and wood sheds, water tanks, and turntables, etc.?" After referring to certain sections of the statute, the court say: "The more specific inquiry here is, do

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the lots and lands described in the complaint, and occupied as therein described, constitute a part of the right of way?" After full consideration, the court answers the question in the affirmative. It refers to the case in 98 Ill. 350, as deciding the same point, and quotes from and approves that case. In some states the exemption from local taxation is held to cover such property, and only such, as might be taken by condemnation proceedings. See *State v. Hancock*, 33 N. J. Law, 315; *Milwaukee & St. P. Ry. Co. v. City of Milwaukee*, 34 Wis. 271. Among the powers conferred by our statutes upon railroad corporations is the following (subdivision 3. § 2947, Rev. Codes): "To acquire under the provisions of the statute on eminent domain or by purchase all such real estate and other property as may be necessary for the construction, maintenance and operation of its railroads and the stations, depot grounds and other accommodations reasonably necessary to accomplish the objects of its incorporation." It will not be questioned but that this plaintiff might have acquired by condemnation proceedings, under the chapter on eminent domain, all the real property which the trial court relieved from local taxation in this case. In this state, land that may be acquired by condemnation proceedings by a railroad company exactly corresponds with the broad definition given to the term "right of way" by the courts of last resort in Illinois and Indiana. That under our statutes the term should receive the same construction we have no doubt. The cases cited abundantly demonstrate the necessity, for commercial purposes, of this definition, and this necessity grows more imperative every day. The services which the public expect and demand from the railroad companies constantly grow more onerous. It would, indeed, be a mistaken policy, in our rapidly developing state, to curtail any of the agencies which tend to render this service efficient. We hold, then, that the right of way of a railroad company, or, using the constitutional phraseology, the "roadway" of a railroad company, includes, not only the strip of ground upon which the

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main line is constructed, but all ground necessary for the construction of side-tracks, turnouts, connecting tracks, station houses, freight houses, and all other accommodations reasonably necessary to accomplish the objects of their incorporation. Under our constitution, this roadway must be assessed by the state board of equalization, and is not assessable by the local assessor. The evidence shows that all the ground upon which the trial court canceled the local tax comes within our definition of "roadway." Its judgment must therefore be affirmed.

Another question was argued at length, and with much ability, in the briefs of all the counsel in the case and that is whether or not, under our constitution, the local assessor can assess the improvements on the roadway, other than "roadbed, rails, and rolling stock," separate and apart from the roadway itself. This is a constitutional question of much importance, and perhaps not free from difficulties. It ought not to be decided unless its decision is necessary to the determination of the case. Not only do we deem its decision unnecessary in this case, but we cannot conceive how the question can arise on this record. No such assessment of improvements has ever been made or attempted. No action has been brought to cancel any such assessment. The assessment was of lots and parcels of land. It may be that in fixing the value thereof the improvements thereon were considered. But that fact cannot affect our decision. The assessment was of land. If that was assessable, the whole tax must stand. If it was not assessable,—and we hold that it was not,—the whole tax must fall. Should we hold with respondent that the improvements were not locally assessable, the tax would not the more certainly fall; and, should we hold with appellant that they were locally assessable, the tax would not the less certainly fall, because neither the trial court nor this court could make an assessment or determine the separate value of the improvements. And the tax being unseverable, and a part illegal, the

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view.

Note

whole must fall. The only possible condition under which the question of the local assessment of improvements could be decisive of this case would be this: If the lands were locally assessable, and the improvements not, then, if the improvements were included, that fact would invalidate the entire tax. But no such claim is made, or could for a moment be made, under our constitution. The proposition of the learned counsel for appellant is exactly the reverse. He contends that, granting that the lands are not locally assessable, yet the improvements are so assessable. The proposition is of no importance in this case. Affirmed. All concur.

NOTE.

Railroads—Taxation—Roadway—Right of Way—Railroad Track.—The right of way of a railroad, including the superstructures of main, side, or second track, and turnouts, and the stations and improvements of the railroad company on such right of way, shall, for the purposes of taxation, be held to be real estate, and denominated "railroad track," and shall be assessed by the state board of equalization. *Peoria, Decatur & Evansville R. Co. v. Goar* (Ill.), 29 Am. & Eng. R. Cas. 189.

Under the revenue laws of Indiana, lands occupied by a railroad company with its main track, side tracks, depot, round-house, coal-sheds, and water tanks are to be valued and assessed by the state board of equalization as "railroad track." *Pfaff v. Terre Haute & Indianapolis R. Co.* (Ind.), 29 Am. & Eng. R. Cas. 181.

The roadway is the right of way, which has been held to be the property liable to taxation. *Appeal of North Beach, etc.*, R. Co., 32 Cal. 499. The rails in place constitute the superstructure resting upon the roadbed. *San Francisco, etc.*, R. Co. v. State Board, 60 Cal. 34, 13 Am. & Eng. R. Cas. 248; *San Francisco v. Central Pac. R. Co.*, 63 Cal. 469, 13 Am. & Eng. R. Cas. 664; *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 24 Am. & Eng. R. Cas. 523.

Fences cannot be regarded as a part of the roadway for purposes of taxation, but are "improvements" assessable only by the local authorities in the mode required in the case of depots, station grounds, shops and buildings owned by the company, and the part of the taxes assessed against the fences not being separable from the other part, the whole assessment is invalid. *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 24 Am. & Eng. R. Cas. 523.

The track of a street railway consisting of stringers, ties, and rails affixed to the land, is "land" within the meaning of a statute imposing a tax, and declaring that the term "land" shall be construed to "include the land itself, and all buildings, and all other articles erected upon or affixed to the same." *People v. Cassity*, 46 N. Y. 49.

Note

The foundations, columns, and superstructure of an elevated railway are included in the words "lands" and "real estate," as defined in the statute, and the company may be assessed therefor although the fee of the land is in another. *People v. Com'rs of Taxes*, 82 N. Y. 459, 2 Am. & Eng. R. Cas. 343, *aff'g* 19 Hun (N. Y.) 460. See also *People v. Tax Com'rs*, 101 N. Y. 322, *reversing* 23 Hun (N. Y.) 687.

Town lots, over which a railroad company has the right of way, may be taxed as right of way, but this precludes them from being also taxed as town or city lots. *Chicago, etc., R. Co. v. Miller*, 72 Ill. 144.

In *Chicago, etc., R. Co. v. People* (Ill. 1891), 27 N. E. Rep. 200, it was held that under Illinois Rev. Stat., ch. 120, § 42, which defines the "railroad track," which must be assessed by the state board of equalization, as the "right of way, including the superstructure of main, side, and second track and turn-outs, and the station and improvements of the railroad company on such right of way," city lots which have been bought by a railroad company with the intention of using them as a site for its station, when it should acquire title to other adjoining lots, but which it has held for four or five years without attempting to acquire title to such other lots, form no part of its "railroad track." The court said: "It seems to us to be very clear that whatever appropriation the appellant intends to make, or may hereafter make, of said lots, when it has succeeded in acquiring title to the residue of its proposed depot grounds, said lots cannot now be said to be, in any proper sense, a part of its 'railroad track.' They are not, and never have been, actually appropriated by the appellant as a part of its right of way, and so do not come within its definition of 'railroad track,' as given by said section 42 of the revenue law. Even if the title to the residue of the site for the proposed passenger station had been acquired and the station built, that alone would not necessarily constitute the lots in question a part of appellant's 'railroad track.' Where stations and other improvements are erected on the 'right of way' of a railroad company, they may be regarded as a part of the 'railroad track,' within the meaning of section 42 of the revenue law; but section 46 clearly contemplates the possibility of stations and other buildings and structures of railroad companies not being on their right of way, and therefore not a part of their 'railroad track.' No railroad tracks have ever been constructed upon the lots in question here, and there is no proof in the record that the appellant contemplates the construction of any of its tracks thereon. It is not easy to see, then, how the construction by the appellant of its passenger station on a piece of land adjoining this right of way will *ipso facto* have the effect of constituting said land a part of the right of way. But there has so far been no appropriation of said lots as a site for a passenger station. The evidence merely shows an intention to make such appropriation whenever the complainant succeeds in obtaining title to the residue of the property necessary for the purpose. That may or may not happen, and, until it does, the lots which the appellant now holds cannot be regarded as having been definitely appropriated to any railroad purpose. There is no view of the case, then, in which said lots can now be regarded as a part of the appellant's 'railroad track.'"

Under the terms "roadway," "right of way," etc., all of a rail-

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road company's realty, exclusive of that unnecessary to the operation of the road, is assessed for taxation, in most of the states, by the state board of equalization.

Orange, etc., R. Co. v. Alexandria, 17 Gratt. (Va.) 176; People v. Barker, 48 N. Y. 70; Buffalo, etc., R. Co. v. Erie Co., 48 N. Y. 93; New Haven v. Fair Haven, etc., R. Co., 38 Conn. 422; 9 Am. Rep. 399; Providence, etc., R. Co. v. Wright, 2 R. I. 459; Burlington, etc., R. Co. v. Lancaster Co., 7 Neb. 33; People v. Com'rs of Taxes, 82 N. Y. 459, 2 Am. & Eng. R. Cas. 343; Union Trust Co. v. Weber, 96 Ill. 346, 3 Am. & Eng. R. Cas. 583; Alexandria Canal, etc., Co. v. District of Columbia, 1 Mackey (D. C.) 217; 7 Am. & Eng. R. Cas. 325; Burlington, etc., R. Co. v. Lancaster Co., 15 Neb. 254, 13 Am. & Eng. R. Cas. 664.

CHICAGO, M. & ST. P. RY. CO.

v.

GRANT.

(*Supreme Court of Illinois, April 3, 1897.*)

Right of Way—Title by Adverse Possession.—A railway company having received a deed to a strip of land for its right of way occupied the same for seven years, fencing in the land and paying all taxes legally assessed thereon. *Held*, that the company had actual and continuous possession, under claim and color of title, for seven successive years within the meaning of the Illinois statute of limitations, according to the purport of its paper title.

Same—Tax Assessments.*—Land held and used as right of way by a railway company is subject to assessment by the state board of equalization as such, but not to assessment by the local assessor as part of the section from which it was separated by the conveyance to the railway company.

ERROR to Cook county superior court. *Reversed.*

This is an action of ejectment, commenced in the superior court of Cook county on January 15, 1889, by the defendant in error against the plaintiff in error. In the original declaration, filed on February 19, 1889, the property sought to be recovered, which lies in Cook county, is described as follows: "A strip, belt, or piece of land one hundred (100) feet wide, extending from the west to the south

Case Stated.

*See *Chicago, M. & St. P. Ry. Co. v. Cass County et al.* (N. Dak.), *ante*, and *note*.

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side, across the following described tract of land, viz: the southeast quarter of the southwest quarter of the northwest quarter of section thirty-five (35), township forty (40) north, range thirteen (13) east of the third principal meridian, through the center of which strip, belt, or piece of land the center line of the railroad of said Chicago, Milwaukee and St. Paul Railway Company is now located, so as to leave one-half in width on each side of said center line." On October 6, 1893, the declaration was amended by inserting the following description: "Otherwise described as that part of the southeast quarter of the southwest quarter of the northwest quarter of section thirty-five (35), township forty (40) north, range thirteen (13) east of the third principal meridian, in Cook county, Illinois, which lies west of a line described as follows: Beginning at a point on the west line of said tract, 290 feet north of the southwest corner thereof, running thence southwesterly to a point on the south line thereof, 110 feet from the said southwest corner of said tract." The defendant filed the plea of general issue, and a special plea setting up payment of taxes and possession for seven years, under claim and color of title, of said premises, as a part of the right of way of said defendant's railroad. The cause was tried before a jury, who returned a verdict finding the defendant guilty of unlawfully withholding the property in dispute from the plaintiff, upon which verdict, after overruling motion for a new trial, judgment was rendered. At the close of the trial, the defendant asked the court to give the jury the following instruction: "The court instructs the jury that the evidence in this cause is not sufficient to warrant a verdict for the plaintiff, and they are directed to find the defendant not guilty." This instruction was refused, and its refusal is the main assignment of error relied upon by the plaintiff in error.

E. Walker, for plaintiff in error.

Pope & Small, for defendant in error.

MAGRUDER, C. J. (after stating the facts). The

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plaintiff showed a connected chain of title from the government to herself. It is not necessary to set out this title, as it is not denied that plaintiff showed herself to be the owner of the paramount title, and is entitled to recover, unless the defense set up by the plaintiff in error, as hereinafter set forth, has been sustained. As against the amended declaration, which was not filed until October, 1893, the plaintiff in error relies upon 20 years' possession; but we do not deem it necessary to consider the statute of limitations in regard to possession for 20 years. A consideration of the other defense relied upon will be sufficient to dispose of the case.

The plaintiff in error claimed that it had been in actual possession of the premises in question, under claim and color of title, made in good faith, and continued in such possession for seven successive years, and that during said time it paid all taxes legally assessed on said land, and was therefore entitled to be adjudged to be the legal owner thereof, according to the purport of its paper title. The plaintiff in error introduced in evidence, as color of title, a deed bearing date November 19, 1872, executed by Isaac N. Hardin and his wife and one Betsy N. Holbrook, to the plaintiff in error, conveying, in consideration of \$1,400, the following parcel of land, in the town of Jefferson, Cook county, Ill., to wit: "A strip, belt, or piece of land one hundred (100) feet wide, extending from the west to the south side across the following described tract of land, *viz.* the southeast quarter of the southwest quarter of the northwest quarter (being ten acres) of section thirty-five (35) township forty (40) north, range thirteen (13) east of the third principal meridian, through the center of, which said strip, belt, or piece of land the center line of the railroad of said company is now located, so as to leave one-half in width on each side of said center line." The proof is clear and undisputed that from the year 1872, down to the time of the commencement of this suit, the plaintiff in error was in possession of the strip of land, 100 feet wide, in controversy. The strip in question

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is a part of the right of way of plaintiff in error, and has been used as such continuously during the period aforesaid. Soon after the track was laid, and the line of the railroad began to be operated, the strip 100 feet wide was fenced in. Such fence has been maintained ever since its original construction. It follows that that part of the statute of limitations which requires an actual and continuous possession, under claim and color of title, for seven successive years, is clearly established by the proof.

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Possession.

Upon the question of payment of taxes, the proof shows, and it is not denied, that the plaintiff in error paid all the taxes legally assessed upon said strip for the six years 1882, 1883, 1884, 1885, 1886, and 1887. The real question in dispute between the parties is as to the payment of the taxes for the year 1881. Plaintiff in error claims that it paid the taxes legally assessed for the year 1881, while the defendant in error claims that she paid the only tax legally assessed for the year 1881, and that plaintiff in error paid no tax for that year which it is entitled to rely upon under the statute of limitations. The E. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of said section 35, containing 40 acres, was assessed by the local assessor for the year 1881, and the taxes for that year, as so assessed, were paid on April 29, 1882, by George R. Grant, the son of the defendant in error, for one Hugh D. Hunter. The 40-acre tract, upon which the taxes were so paid, included the right of way in controversy; but prior to this, and on the 1st day of April, 1882, the plaintiff in error paid the taxes for 1881 assessed upon the strip as railroad track by the state board of equalization. The case therefore properly turns upon the question whether the tax as assessed by the state board of equalization, and paid by the plaintiff in error, was the legal tax for the year 1881, or whether the tax assessed by the local assessor for that year, and paid by George R. Grant, was the legal tax for 1881. This court, in a number of cases, has held that land held and used as right of way by a railroad company, includ-

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ing the superstructures thereon, is railroad track, and not subject to assessment by the local assessor; and that land so held by a railroad company as right of way is required by law to be assessed for taxation by the state board of equalization, and that an assessment of such property by the local assessor is void. *Railway Co. v. Miller*, 72 Ill. 144; *Railroad Co. v. Weber*, 96 Ill. 448; *Chicago & A. R. Co. v. People*, 98 Ill. 354; *Railway Co. v. Goar*, 118 Ill. 136, 8 N. E. 682; *Chicago & A. R. Co. v. People*, 129 Ill. 571, 22 N. E. 864, and 25 N. E. 5.

The evidence in the case at bar shows that the plaintiff in error made return of its schedules for the year 1881 to the county clerk of Cook county, and also furnished such schedules to the state auditor, in such manner and form as is required by the statute. The proof also shows that the assessment upon the company's railroad track for the year 1881 was made by the state board of equalization, and distributed to the several counties, and by the proper officers of the counties distributed to the several towns. The schedules and the collector's warrant and the tax receipt for the taxes of the year 1881 are all in evidence. From these it appears that the plaintiff in error paid the taxes for the year 1881 assessed by the state board upon its right of way running through the N. W. $\frac{1}{4}$ of said section 35. As the strip in controversy in this suit is undoubtedly a part of this right of way, and assessable by the state board as railroad track, and as it was so assessed, and the tax so assessed for 1881 was paid by plaintiff in error on April 1, 1882, we see no reason why plaintiff in error has not brought itself within the terms of the seven-years limitation act. It has paid all taxes legally assessed for the seven years from 1881 to 1888, inclusive. Under the authorities referred to, the assessment of the 40 acres through which this strip runs by the local assessor for the taxes of 1881 was illegal and void; and therefore the payment of the tax so assessed on the 29th of April, 1882, cannot have the effect of breaking the continuity of the payments by plaintiff in error for seven years.

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The conclusion here reached is sustained by the recent decision of this court in *Railroad Co. v. Warfel*, 163 Ill. 641, 45 N. E. 169. In the latter case, where it appeared that a strip occupied by a railroad company was assessed as railroad track, and the taxes growing out of the assessment thus made were paid each year by the railroad company, it was said: "The strip of land, as to its assessment and taxation, and payment of taxes, was separated and removed from the quarter section of land of which it was a part; and although the owner of the whole title, in the payment of taxes, obtains a receipt for the whole quarter, he in fact pays no taxes on that part of the quarter occupied by the railroad company as right of way." In view of the decision made in the *Warfel* Case, it cannot be said that the description of the premises in the deed introduced by the plaintiff in error as color of title, nor the description in the schedules, warrants, and tax receipts introduced in evidence by plaintiff in error are justly subject to the charge of indefiniteness made against them by counsel for defendant in error. Such schedules, warrants, and receipts, in their terms and statements, seem to conform to the requirements laid down in sections 40 to 50, inclusive, of the revenue act.

It is claimed by counsel for defendant in error that at the time when plaintiff in error paid the taxes for the year 1881, as assessed by the state board of equalization, it was not the owner of the premises, inasmuch as its color of title under the seven-years limitation law had not then ripened into a title. The case of *Chicago & A. R. Co. v. People*, 153 Ill. 409, 38 N. E. 1075, is relied upon in support of the contention that the right of way could only be assessed by the state board of equalization as railroad track while the railroad company was the owner of it, and that it could not be so assessed while its ownership was inchoate by reason of the nonrunning of the statute of limitations for the full period of seven years. The statute requires sworn lists or schedules to be made out, not exclusively by a railroad company owning the railroad, but also

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by any railroad company operating a railroad. Moreover, we do not regard the case referred to as sustaining the contention of counsel. In that case the local authorities assessed a bridge, used by a railroad company under a lease from a bridge company, for taxation under a special act passed in 1873, entitled "An act to provide for the assessment and taxation of bridges across navigable streams on the borders of this state." The railroad company contended that the bridge was a part of its railroad track, and should be assessed as such, while the people claimed that the bridge was no part of the railroad's track or right of way, but that it belonged to the bridge company, and was assessed under said act of 1873, which provided that such bridges should be assessed by the township assessor in the town where they were located as real estate. It was merely held that, under the circumstances of that case, the assessment was properly made by the township assessor.

For the reasons herein stated, we are of the opinion that the trial court erred in not instructing the jury, as requested by the plaintiff in error, to find the defendant not guilty. Accordingly, the judgment of the superior court of Cook county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

WASHINGTON

v.

MISSOURI, K. & T. RY. CO. OF TEXAS.

(Supreme Court of Texas, Jan. 25, 1897.)

Derailment—Death of Pedestrian—Company Chargeable with Notice—Question for Jury*.—The body of deceased was found in a cut under a derailed car. There was a foot-path running through the cut by the side of the tracks, and upon defendant's right of way, to a railroad bridge, so constructed by defendant as to admit of the

*See notes at end of case.

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safe passage of pedestrians. On the night before the body was found, two sections of defendant's train collided in the cut. Witnesses testified that they saw no men, nor lights displayed, upon either section of the train. *Held*, that, defendant having been chargeable with notice that such foot-path was habitually used by the public, the question of negligence and contributory negligence should have been submitted to the jury.

ERROR by plaintiff to court of civil appeals First supreme judicial district. *Reversed*.

J. D. Wolverton and O. T. Holt, for plaintiff in error.
Baker, Botts, Baker & Lovett, for defendant in error.

NOTES.

Injuries to Licensees on Right of Way—Duty of Company.—If a person is upon a railroad track by the acquiescence of the company, evidenced by a general use on the part of the public, or even of certain individuals, the company owes a duty of care towards such persons which it does not owe to mere trespassers. *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475; *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362, 58 Am. Rep. 512; *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289, 13 Am. & Eng. R. Cas. 615, 44 Am. Rep. 377; *Sutton v. New York C. & H. R. R. Co.*, 66 N. Y. 244; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399; *Davis v. Chicago & N. W. R. Co.*, 58 Wis. 646, 15 Am. & Eng. R. Cas. 424; *Townley v. Chicago, M. & St. P. R. Co.*, 53 Wis. 626, 4 Am. & Eng. R. Cas. 562; *Delaney v. Milwaukee & St. P. R. Co.*, 33 Wis. 67; *Griffiths v. London & N. W. R. Co.*, 14 L. T. 797.

Acquiescence in Crossing.—If the public have been permitted constantly and notoriously, and for a long period, to cross a railway at a place not a highway crossing, persons so crossing are not to be deemed trespassers. *Kansas Pac. R. Co. v. Pointer*, 9 Kan. 620, 14 Kan. 38; *Kelly v. Southern Minnesota R. Co.*, 88 Minn. 98, 6 Am. & Eng. R. Cas. 264; *Donaldson v. Milwaukee & St. P. R. Co.*, 21 Minn. 293; *Brown v. Hannibal & St. J. R. Co.*, 50 Mo. 461; *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537; *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362, 58 Am. Rep. 512; *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289, 13 Am. & Eng. R. Cas. 615, 44 Am. Rep. 377; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399; *Philadelphia & R. R. Co. v. Troutman*, 6 Am. & Eng. R. Cas. 117; *Taylor v. Delaware & H. Canal Co.*, 113 Pa. St. 162, 28 Am. & Eng. R. Cas. 656, 57 Am. Rep. 446; *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33; *Delaney v. Milwaukee & St. P. R. Co.*, 33 Wis. 67.

Use of Road-bed as Foot-Path.—Nor are persons using the right of way in pursuance of a use by foot travelers which has been permitted without objection for a great number of years. *Illinois C. R. Co. v. Hammer*, 72 Ill. 347; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 219; *Davis v. Chicago & N. W. R. Co.*, 58 Wis. 646, 15 Am. & Eng. R. Cas. 424; *Townley v. Chicago, M. & St. P. R. Co.*, 53 Wis. 626, 13 Am. & Eng. R. Cas. 615. See also *Murphy v. Chicago, R. I. & P. R. Co.*, 45 Iowa, 661.

Active and Passive Negligence.—The distinction between active negligence causing an injury and mere passive negligence must be

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clearly kept in view. *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362. Thus, if the company carelessly back its cars against a person using the track by acquiescence, it will be responsible. *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289, 13 Am. & Eng. R. Cas., 615. But if the casualty is caused by an omission merely, and without human agency, as by the neglect to properly fasten cars, which moved and ran against the party injured, there is no liability. *Sutton v. New York C. & H. R. R. Co.*, 66 N. Y. 244; *Nicholson v. Erie R. Co.*, 41 N. Y. 525.

In some States the courts adopt a different view, and hold that passive negligence, or negligence by omission, will render the company liable, provided the omission be the proximate cause of the injury. In *Davis v. Chicago & N. W. R. Co.*, 58 Wis. 646, 15 Am. & Eng. R. Cas. 424, the negligence consisted in leaving on the defendant's track, unattended, an engine fired up, with water in the boiler, which exploded and injured plaintiff, who was walking on defendant's track at a place where the public had for many years been accustomed to pass. It was held that plaintiff could recover for the negligent omission of defendant's servants. So, too, the negligent omission of the company to remove a signal torpedo which had been deposited at a place where the public had long been accustomed to cross the track, although there was no public highway at the place, was sufficient to give a cause of action to a person who was injured by its explosion. *Harriman v. Pittsburgh, C. & St. L. R. Co. (Ohio)*, 32 Am. & Eng. R. Cas. 37.

Mere acquiescence in use of track, however, is held by some cases not to be sufficient to give the persons going upon the track the character of licensees, and that there must be in addition some inducement or invitation to the public, before the company will owe them any duty. *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 513; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500; *Murray v. McLean*, 57 Ill. 378; *Stewart v. Pennsylvania R. Co. (Ind.)*, 14 Am. & Eng. R. Cas. 679; *Wright v. Boston & A. R. Co.*, 142 Mass. 296, 28 Am. & Eng. R. Cas. 652; *Johnson v. Boston & M. R. Co.*, 125 Mass. 75; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208; *Carleton v. Fraconia, I. & S. Co.*, 99 Mass. 216; *Sweeny v. Old Colony & N. R. Co.*, 92 Mass. (10 Allen) 368.

Mere Use without Objection on Part of Company.—The mere fact that persons living in the neighborhood of a railroad track have become accustomed to use it to walk upon without any objection on the part of the railroad company does not in any manner alter or change the duty of the railroad company to such persons. They are simply trespassers. *Finlayson v. Chicago, etc., R. Co.*, 1 Dill. 579; *Bancroft v. Boston, etc., R. Co.*, 97 Mass. 276; *Indiana, etc., R. Co. v. Hudelson*, 13 Ind. 325; *Jeffersonville, etc., R. Co. v. Goldsmith*, 47 Ind. 43; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478; *Illinois, etc., R. Co. v. Godfrey*, 71 Ill. 500; *Illinois, etc., R. Co. v. Hetherington*, 83 Ill. 510; *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33; *Gaynor v. Old Colony R. Co.*, 100 Mass. 508; *McLaren v. Indianapolis, etc., R. Co.*, 8 Am. & Eng. R. Cas. 217; *Yarnall v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. Cas. 726; *Hogan v. Chicago, M. & St. P. R. Co.*, 15 Am. & Eng. R. Cas. 439.

Duty of Person on Track.—A person upon the track of a railroad whether by license and permission of the company or not is bound to keep his eyes and ears on the alert for approaching trains. If

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he neglects this duty he is guilty of contributory negligence. *Wilcox v. Rome, etc.*, R. Co., 39 N. Y. 358; *Sutton v. New York, etc.*, R. Co., 66 N. Y. 243; *Bancroft v. Boston, etc.*, R. Co., 97 Mass. 275; *Illinois, etc.*, R. Co. *v. Hetherington*, 83 Ill. 510; *Railroad Co. v. Houston*, 95 U. S. 697; *Mulherrin v. Delaware, etc.*, R. Co., 81 Pa. St. 366; *Carroll v. Minn., etc.*, R. Co., 13 Minn. 30; *Carlin v. Chicago, etc.*, R. Co., 37 Iowa, 316; *Chicago, etc.*, R. Co. *v. Sweeney*, 52 Ill. 325; *Illinois, etc.*, R. Co. *v. Modglin*, 85 Ill. 481.

But a person walking at night on a railway track at a place customarily used by the public as a walking way is not required to be on the lookout for trains having no lights and giving no other warnings of their approach. *Stanley v. Durham & N. R. Co. (N. Car.)*, 9 Am. & Eng. R. Cas., N. S., 208, and *note*, 210.

MERCHANTS' DISPATCH TRANS. CO.

v.

HOSKINS.

(*Court of Appeals of Kentucky, May 25, 1897.*)

Carriers of Freight—Limiting Liability—Burden of Proof.*—A stipulation in a contract of carriage which exempts a carrier from liability for loss of goods by fire does not apply where the jury can reasonably infer that the goods were stolen from a car and the latter set on fire to conceal the robbery.

Former Appeal—Res Judicata.—Questions settled on a former appeal will not be reviewed.

APPEAL by defendant from Jefferson county circuit court. *Affirmed.*

Isaac T. Woodson, Wm. Lindsay and Lyttleton Cooke, for appellant.

Randolph H. Blain, for appellee.

EDISON

v.

SOUTHERN RY. CO.

(*Supreme Court of Mississippi, April 4, 1898.*)

Ejection of Passenger—Intoxication†—Negligence—Question for Jury.—In an action for the wrongful killing of plaintiff's decedent, it appeared from the evidence that decedent purchased a ticket to his destination, and, being very sick and weak, was assisted on the train by defendant's porter at about 10:30 at night; that the train was stopped at a flag station at about two miles from his destina-

*See *Newberger Cotton Co. v. Illinois Cent. R. Co. (Miss. 1898)*, 10 Am. & Eng. R. Cas., N. S., 334, and extensive *note* 335, *et seq.*

†See notes at end of case.

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tion, and he, apparently objecting, was put off the train by such porter and the conductor; that he had, shortly before boarding the train purchased two small bottles of whiskey, but was a temperate man; that the night was dark and cold, and there was no light at such flag station; and that he was found next morning lying across the track, where he was left by the conductor, dead, and very thin and emaciated. *Held*, that it was error to give a peremptory charge for defendant.

APPEAL by plaintiff from Clay county circuit court.
Reversed.

Critz, Beckett & Jones, for appellant.
S. M. Roane, for appellee.

NOTES.

Carriers of Passengers—Sick and Intoxicated Persons—Right to Refuse Transportation.—A carrier of passengers is not bound to afford accommodations to intoxicated persons. *Lemont v. Washington*, etc., R. Co., 1 Mackey (D. C.) 180, 47 Am. Rep. 238, 1 Am. & Eng. R. Cas. 263; *Murphy v. Union R. Co.*, 118 Mass. 228; *Putnam v. Broadway*, etc., R. Co., 55 N. Y. 108, 14 Am. Rep. 190. Drunken men should not be permitted on the cars, or, if permitted, should be so guarded or separated from the orderly part of the passengers as to prevent injury from them. *Pittsburg*, etc., R. Co., *v. Pillow*, 76 Pa. St. 510.

"A railroad company is not bound to receive any person as a passenger who is drunk to such a degree as to be disgusting, offensive, disagreeable, or annoying, and a person so drunk as to be likely to violate the common proprieties, civilities, and decencies of life has no right to a passage while in that condition. The comfort and convenience of passengers generally must be protected, their opinions and feelings regarded, and proper decorum observed; and although in a railroad passenger car neither the highest breeding of the drawing-room nor the fastidious delicacy of the parlor is required, yet the behavior of all persons therein should be becoming to the place and the general character of the passengers." *Pittsburgh*, etc., R. Co. *v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68, 18 Am. Ry. Rep. 454.

The conductor of a street-railway car may exclude or expel therefrom a person whose condition, by reason of intoxication or otherwise, is such that it is reasonably certain that by act or speech he will become offensive or annoying to other passengers therein, although he has not committed any act of offense or annoyance. *Vinton v. Middlesex R. Co.* 11 Allen (Mass.) 304, 87 Am. Dec. 714.

Slight Intoxication.—But where a person applying for passage upon a railroad train is only slightly intoxicated, and shows no sign that he will not conduct himself properly, he cannot be refused carriage. In *Pittsburgh*, etc., R. Co. *v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68, 18 Am. Ry. Rep. 454, it is said that "slight intoxication, such as would not be likely to seriously affect the conduct of the person intoxicated, would not be sufficient ground to refuse him passage in a public car, although his behavior might not be in all respects becoming."

Intoxicated Passenger Entitled to Due Care.—The mere fact that a man is intoxicated does not of itself deprive him of the

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right to ride upon a railroad car, nor does it free the company from its duty to render to him as a passenger due care. *Milliman v. New York Cent., etc., R. Co.*, 66 N. Y. 642, *affirming 4 Hun* (N. Y.) 409, 6 *Thomp. & C.* (N. Y.) 536, *explaining Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108, 14 *Am. Rep.* 190.

In *Robinson v. Pioche*, 5 Cal. 460, *HEYDENFELDT, J.*, observes: "A drunken man is as much entitled to a safe seat as a sober one, and much more in need of it." And in *Giles v. Great Western R. Co.*, 36 *Upper Canada* 369, *WILSON, J.*, discussing the liability of the company for the injury of a passenger who was, as the conductor said, "pretty drunk" when he got on the train, observed that the defendants would not be liable for his injury "unless the conductor knew the deceased was intoxicated and unable to take care of himself, in which case the conductor would certainly, having taken him as a passenger, be bound to give him that degree of attention as to his safety while under his care which a man in the state of the deceased is fairly entitled to beyond that of an ordinary passenger."

Intoxication as Contributory Negligence.—If the intoxication of the party injured has contributed to the injury, he cannot recover. *Kean v. B. & O. R.*, 61 *Md.* 154, 19 *Am. & Eng. R. Cas.* 321; *Milliman v. N. Y. C. & H. R. R.*, 66 N. Y. 642; *C. R. I. & P. R. v. Bell*, 70 *Ill.* 102; *I. C. R. v. Hutchinson*, 47 *Ill.* 408; *Maguire v. Middlesex R. Co.*, 115 *Mass.* 239.

When Evidence of Intoxication Admissible.—The intoxication of the party injured is admissible in evidence to prove contributory negligence. *H. & T. C. R. v. Waller*, 56 *Tex.* 331, 8 *Am. & Eng. R. Cas.* 431; *S. W. R. v. Haukerson*, 61 *Ga.* 114; *Herring v. W. & R. R.*, 10 *Ired.* (N. C.) 402; *Cleveland, etc., R. Co. v. Sutherland*, 19 *Ohio St.* 151; *Alger v. Lowell*, 3 *Allen* (Mass.) 402; *Cramer v. Burlington*, 42 *Iowa*, 315; *Thorp v. Brookfield*, 36 *Conn.* 321; *Detchett v. Spuyten Duyvil, etc., R. Co.*, 5 *Hun* (N. Y.) 165.

In *Wynn v. Allard*, 5 *W. & S.* (Pa.) 524, the court said: "The evidence of intoxication ought to have been received; not because the legal consequences of a drunken man's acts are different from those of a sober man's acts, but because where the evidence of negligence is nearly balanced, the fact of drunkenness might turn the scale, inasmuch as a man partially bereft of his faculties would be less observant than if he were sober, and less regardful of the safety of others."

Hearsay Evidence of Drunkenness not Admissible.—In *Lake Erie & Western R. Co. v. Zoffinger*, 15 *Am. & Eng. R. Cas.* 371, the plaintiff had been struck by a moving train at a street crossing, the defense was that plaintiff was intoxicated, and the railroad company offered to prove that just before the accident, the plaintiff, in a saloon, called for a drink of liquor, and the barkeeper told him he had enough; the court rejected the offer. *Held*, that the evidence was properly refused, as the fact of plaintiff's intoxication could not be proved by the declaration of a third person.

Railroad Company not Bound to Carry Intoxicated Passengers.—Common carriers of passengers are not bound to carry drunken persons; they have the right to repress and prohibit all disorderly conduct in their vehicles, and to expel or exclude therefrom any person whose conduct or condition is such as to render acts of impropriety, rudeness, indecency or disturbance either inevitable or

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probable. *Vinton v. Middlesex R. Co.*, 11 Allen (Mass.) 304; *Atchison, etc., R. Co. v. Weber*, 21 Am. & Eng. R. Cas. 418.

Insane Persons.—A carrier is not obliged, as a matter of law, to receive as a passenger an insane person or one whose physical or mental condition is such that his presence upon the vehicle may cause injury or substantial discomfort to the other passengers, and such insane person may be refused where he is known to be insane, though at the time of offering to become a passenger he is apparently harmless, and conducts himself in no way differently from other persons. *Meyer v. St. Louis, etc., R. Co.*, 54 Fed. Rep. 116.

Expulsion of Intoxicated Passengers.—A conductor upon the defendant's train removed therefrom the plaintiff's intestate, who had failed to produce a ticket when required, and who had no money wherewith to pay his fare. There was evidence tending to show that the intestate had bought and lost his ticket, and before he was expelled one of his companions tendered the fare to the conductor, who refused to receive it, demanding a ticket. The intestate, who was very much intoxicated, was put off the train in a cut twenty feet deep. He proceeded in the direction of his home some one thousand seven hundred feet, where he laid or fell down, and was run over and killed about fifteen minutes later, by the train of another company which had the right to run its cars over the defendant's road. *Held*, that, as the intestate was wrongfully removed from the train, the question as to whether his death was or was not directly traceable to such removal should have been left to the jury, and that the court erred in nonsuiting the plaintiff. *Guy v. New York, etc., R. R. Co.*, 30 Hun (N. Y.), 399.

If having exercised reasonable prudence, considering the time, place, and circumstances, as also the condition of the drunken man himself, the conductor expels an intoxicated passenger, who is afterwards run over and killed by another train not in fault, the expulsion itself is not such a proximate cause of the death as will make the company liable. *R. R. Co. v. Valleley*, 32 Ohio St. 345.

If train officials who are aware that a passenger is so intoxicated as to be unable to care for himself, eject him from a train at a place and under such circumstances as to expose him to danger from passing trains, the company will be liable, if while in such helpless condition and shortly after his expulsion, he is killed by another train on the same road. *Louisville & Nashville R. Co. v. Ellis, Administratrix* (Ky. 1895), 2 Am. & Eng. R. Cas., N. S., 132.

More drunkenness which does not take away consciousness or deprive one of the power to take care of himself will not relieve him of the responsibility of avoiding danger, and if after the expulsion he is run over and killed by another train, the expulsion is not such proximate cause of the death as to make the company liable. *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62; *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601.

In an action against a railway company for the death of a drunken man run over after being ejected from a train, a charge to find for the plaintiff if the death "was caused by or was the natural and probable consequence of his being ejected by the conductor in such a condition," was held to be erroneous in not limiting the liability to the "natural and probable consequences" of the ejection. *St. Louis, etc., R. Co. v. Williams*, (Tex. Civ. App. 1896) 37 S. W. Rep. 992.

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If a passenger is unable to take in his position, surrounding perils, and his duty to avoid them, or if he does not possess the power of locomotion, and he is put off the train by the conductor because of his misconduct, and in a place known by the conductor to be dangerous to one in his condition, the company is liable for damages resulting from such action. *Johnson v. Louisville, etc., R. Co.*, 104 Ala. 241; *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62; *Johnson v. Chicago, etc., R. Co.*, 58 Iowa 348; *Louisville, etc., R. Co. v. Sullivan*, 81 Ky. 629, 50 Am. Rep. 186.

Apoplexy Mistaken for Drunkenness.—A passenger stricken with apoplexy while riding on a street car, although attended with severe vomiting, to the inconvenience and great discomfort of other passengers, cannot be removed while in a speechless and helpless condition, and laid in the open street, on a black, drizzling December day, and there abandoned, with no effort to procure him attention, without a gross violation by the carrier of its duty as such, and liability for resulting damage. The mistake of the driver in supposing that the passenger was drunk, when the latter had ridden a considerable distance without misbehavior, and had been guilty of none except the vomiting occasioned by his illness, cannot excuse the company. *Conolly v. Crescent City R. Co.* 37 Am. & Eng. R. Cas., 117.

Sick and Infirm Persons.—While persons who are ill have a right to enter and travel upon the conveyances of a common carrier of passengers, nevertheless the carrier is not bound to accept as a passenger, without an attendant, one who, because of physical or mental disability, is unable to take care of himself; but should the carrier voluntarily accept as a passenger such a person without an attendant, his inability to care for himself, rendering special care and assistance necessary, being apparent or made known at the time of his application for carriage to the servants of the carrier, the latter will be held responsible if such care and assistance are not afforded. *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89; *Croom v. Chicago, etc., R. Co.*, 52 Minn. 296, 38 Am. St. Rep. 557.

"Sick persons have the right to enter the cars of a railroad company. As common carriers of passengers, they cannot prevent their entering their cars." *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607.

AIREY

v.

PULLMAN PALACE CAR CO. *et al.**(Supreme Court of Louisiana, April 8, 1898.)*

Action against Sleeping Car Company—Judgments—Errors of Clerk.—As between the passenger and the railroad company, the latter is responsible to the former for a breach of a contract of carriage growing out of the negligence or oversight of employees of the Pullman Car Company.

Carrying Passenger beyond Destination—Liability for Negligence of Sleeping Car Porter.*—It devolves upon the railroad company,

*See *Louisville & N. R. Co. v. Ray* (Tenn. 1898), 11 Am. & Eng. R. Cas., N. S., 174, and *note*, 184.

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through the employees of the palace-car company, to timely arouse passengers to enable them to get off at the station of their destination. A passenger carried beyond destination may have a right of action. The contract of the passenger is not subject to limitation of responsibility, if any such responsibility was stipulated between the palace-car company and the railroad company.

Same—Limiting Liability.—Loss of time, "expenses occasioned," and "inconvenience" are elements of damages proven.

Same—Elements of Damage—Record.—The copy of the record was complete.

Certiorari—Res Judicata.—The issue involved in the application for the writ was considered and disposed of in the same case (title as above) on appeal.

Same.—There is no ground for the writ. It is discharged.
(Syllabus by the Court.)

APPEAL and application for writ of *certiorari* by plaintiff from civil district court, parish of Orleans. Reversed as to Pullman Palace-Car Company, and modified and affirmed as to the Texas Pacific Railway Company.

Joseph N. Wolfson, for appellant.

Percy Roberts, for appellee Pullman Palace-Car Co.

Howe, Spencer & Cocke, for appellee Texas & P. Ry. Co.

BULLOCK

v.

DELAWARE, L. & W. R. Co.

(*Court of Errors and Appeals of New Jersey, June 20, 1898.*)

Carriers of Passengers—Forcible Enforcement of Rules—Insult—Exemplary Damages.*—If there be no evidence to justify the assessment of exemplary damages against a defendant, the trial court may so instruct the jury.

Same.—Proof of asperities in colloquy between the conductor of a railway train and a passenger who resists the enforcement in good faith of a rule of the railway company, which asperities were induced by the behavior and language of the passenger, is not sufficient to justify the assessment of exemplary damages against the railway company.

(Syllabus by the court.)

ERROR by plaintiff to supreme court. *Affirmed.*

John Linn, for plaintiff in error.

Flavel McGhee, for defendant in error.

*See 10 Am. & Eng. R. Cas., N. S., notes 258 *et seq.*, and 548 *et seq.*

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ILLINOIS CENT. R. CO.

v.

LE BLANC.

(Supreme Court of Mississippi, April 5, 1897.)

Removal of Cause—Parties.—In its petition for removal a foreign railroad company alleged that certain of its employees, who were citizens of the state where the action was brought, were fraudulently joined with it as co-defendants in an action for trespass, to prevent the removal of the cause to the federal court. But it appeared from such petition that the alleged trespass was committed by its co-defendants in obedience to its orders. *Held*, that as it did not appear from the petition itself nor from the record as a whole that the petitioner was wrongfully joined with its co-defendants, it was no error to deny the application for removal.

Same—Measure of Damages—Evidence.—In an action for trespass for the removal of gravel from plaintiff's land, evidence of prices offered to plaintiff by would-be purchasers is not admissible to prove the proper measure of damages.

Same—Same—Same.—Testimony as to sales of gravel, where there is evidence in the case showing the cost of transportation to market, is admissible.

Same—Same—Same.—But it was error to admit evidence to show the price paid *per surface yard* to contractors for placing gravel upon the streets of a city, there being no evidence in the case as to their profits or the amount allowed them as consideration for their guaranteeing their work for a certain length of time.

Same—Same—Same.—In such action it was competent for the plaintiff to show that the gravel removed and converted by the defendant was used by the latter for ballasting its tracks.

Same—Same—Same.*—In such action, where defendant, while in possession of the gravel pit of plaintiff under an honest claim of title, took gravel therefrom and converted it to his own use, the measure of damages was its value before disturbed in its natural position, as ascertained from the whole evidence, and not from the evidence alone as to prices received from sales in small quantities.

Same—Estoppel.—Plaintiff was not estopped from claiming damages for such taking and conversion by the fact that he, while doubtful of the validity of his own title, assisted defendant to load the gravel on the cars of the latter.

APPEAL by defendant from Pike county circuit court.
Reversed.

Mayes & Harris, for appellant.

Cassedy & Cassedy and *J. H. Price*, for appellee.

NOTE.

Damages for Abstracting Minerals from Mines under Bona Fide Claim of Title.—In *Herdic v. Young*, 55 Pa. St. 176, it was said: "Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have

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but little difficulty in managing the forms of action so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value in place, and with such other damage to the land as his mining may have caused." *Coxe v. England*, 65 Pa. St. 212; *Webster v. Moe*, 35 Wis. 75; *Railway Co. v. Hutchins*, 32 Ohio St. 571; *Winchester v. Craig*, 33 Mich. 205; *In Ross v. Scott*, 15 Lea (Tenn.), 479, a defendant, who by mistake mined coal, cut timber, and built houses on another's land, was held liable for the value of the coal *in situ*, and entitled to allowance for permanent improvement to the land. The court said: "The weight of authority, both of English and American, now is, that where there is an honest dispute as to title, or where the trespass has been from ignorance and not wilful, the damages will be confined to the value of the property before the trespass was committed, or, to use the language of the English courts, 'at the same rate as if the property taken had been purchased *in situ* by the defendant at the fair market value of the district;'" and cited *Wood v. Morewood*, 3 Q. B. 440; *Jegon v. Vivian*, L. R. 6 Ch. 742; *Hilton v. Woods*, L. R. 4 Eq. 432; *in re United Merthyr Collieries Co.*, L. R. 15 Eq. 46; *Livingston v. Raward's Coal Co.*, 42 L. T. (N. S.) 334; *Goller v. Felt*, 30 Cal. 481; *Forsyth v. Wells*, 41 Pa. St. 291; *Ward v. Carson River Wood Co.*, 13 Nev. 44; *Weymouth v. Chicago, etc., R. Co.*, 17 Wis., 550; *Foote v. Merrill*, 54 N. H. 490; *Longfellow v. Quimby*, 33 Me. 457; *Stockbridge Iron Co. v. Cove Iron Works*, 102 Mass. 80; *Railway Co. v. Hutchins*, 32 Ohio St. 571. *Tilden v. Johnson*, 52 Vt. 628; s. c., 36 Am. Rep. 769, n.

If a trespasser works a mine under a *bona fide* claim of title, he will be allowed to deduct the cost of getting and severing the coal as well as the cost of bringing it to the pit's mouth. *Chamberlin v. Collinson*, 45 Iowa 429. *Contra*, *Franklin Coal Co. v. McMillan*, 49 Md. 549, 33 Am. Rep. 282.

SOUTHERN RY. CO.

v.

WATSON.

(Supreme Court of Georgia, April 13, 1898.)

Comparative Negligence—Damages*—Instruction.—It was, in the trial of an action for damages to personalty against a railroad company, erroneous, after reading section 2322 of the Civil Code, to charge, without qualification or explanation, as follows: "That is what we call contributory negligence. If both parties are at fault, the plaintiff would be entitled to recover, but the jury would have the right to scale his damages."

Same.—It was also, in such case, erroneous to charge as follows: "To illustrate: If the fault was about half and half,—one party as much at fault as the other,—the jury so thought,—you would have the right to give the plaintiff half damages."

(Syllabus by the Court.)

*See notes at end of case.

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• **ERROR** by defendant from Douglas county superior court. *Reversed.*

B. G. Griggs, for plaintiff in error.

J. H. McLarty and *A. L. Bartlett*, for defendant in error.

LITTLE, J., in delivering the opinion of the court, said :

"Another ground of the motion is because the court, after giving in charge to the jury the following provisions of law contained in section 2322 of the Civil Code, that 'no person shall recover from a railroad company for injury to himself or property where the same is done by his own consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him,'—added as follows: 'That is what we call 'contributory negligence.' If both parties are at fault, the plaintiff would be entitled to recover, but the jury would have the right to scale his damages.'" This charge, while the statement of a correct legal proposition, does not measure the right of recovery in such cases, and, if left to stand alone, is error. Its legal effect is to establish the proposition that, without qualification, whenever the plaintiff and the agents of the company were both at fault, the plaintiff might recover, but the jury would have the right to lessen his damages. While this principle is contained in the section of the Code above referred to, there is another provision of law which the judge probably overlooked in his charge. That is to say, if the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. These sections of the Code are not in conflict. They must both be allowed to stand as the law governing cases of this character, and, when construed with reference to each other, the provision of law is that, when both parties are at fault, the plaintiff may nevertheless recover, and the damage shall in such cases be diminished by the

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jury in proportion to the amount of default attributable to him, but, if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover at all. Civ. Code, § 3830. This is undoubtedly a true statement of the proposition, because the section which authorizes the plaintiff to recover when both are fault (2322) declares in the first paragraph that no person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent, or is caused by his own negligence. It must be noted that the matter to be avoided by ordinary care is the consequences to plaintiff when the defendant is negligent and a proper construction of the section of the Code referred to is that, if the defendant is negligent, the plaintiff cannot recover if he could have avoided the consequences to himself by the exercise of ordinary care. The concluding paragraph of section 3830, which is in these words: "But in other cases the defendant is not relieved, although the plaintiff may have in some way contributed to the injury sustained,"—has reference alone to that class of cases in which the plaintiff could not, by the exercise of ordinary care, have avoided the consequences to himself, caused by the defendant's negligence. This court in the case of *Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105, reversed the judge below because he charged the jury as follows: "If, by the exercise of ordinary care and diligence, the plaintiff could have avoided the consequences to herself of the defendant's negligence, she cannot recover; but if both parties were at fault, and the alleged injury was the result of the fault of both, then, notwithstanding the plaintiff's negligence, she would be entitled to recover, but the amount of the recovery would be abated in proportion to the amount of default on her part." In that case JUSTICE LUMPKIN, in construing these sections of the Code, says: "It seems to be the clear meaning of our law that the plaintiff can never recover in an action for personal injuries, no matter what the negligence of the defendant may be, short of actual wantonness, when the proof

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shows he could by ordinary care, after the negligence of the defendant began, or was existing, have avoided the consequences to himself of that negligence. The law also clearly contemplates cases in which, while the plaintiff is to some extent negligent, he nevertheless could not, by using ordinary care, have avoided an injury resulting from defendant's negligence." This we understand to be the law. See *Railway Co. v. Blake* (Ga.) 29 S. E. 288. In the Case of *Luckie*, *supra*, the learned judge formulates a charge which involves the provisions of law contained in these two sections of the Code, and which seems to be correct, in the following words: "But if both parties were at fault, and the alleged injury was the result of the fault of both, and you find from the evidence that the plaintiff could not, by ordinary care, have avoided the alleged injury to herself occasioned by defendant's negligence, then, notwithstanding she may have been to some extent negligent, she would be entitled to recover, but the amount of the damage should be apportioned," etc. In the case of *Railroad Co. v. Johnson*, 38 Ga. 433, McCADY, J., delivering the opinion of the court, says, construing these two sections of the Code: "If the plaintiff, by the exercise of ordinary care, could have avoided the consequence to himself of the defendant's negligence, he cannot recover at all. But in other cases (that is, in cases where, by ordinary care, he could not have avoided the consequences of defendant's negligence) the circumstance that the plaintiff may have in some way contributed to the injury sustained shall not entirely relieve the defendant, but the damages shall be apportioned according to the amount of default attributable to each." Tested by these rulings, the charge of the court complained of was error.

NOTE.

Comparative Negligence—Definition.—Comparative negligence is that doctrine in the law of negligence by which the negligence of the parties is compared in the degrees of "slight," "ordinary," and "gross" negligence, and a recovery permitted notwithstanding the contributory negligence of the plaintiff, when the negligence of the plaintiff is slight and the negligence of the defendant gross, but

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refused when the plaintiff has been guilty of a want of ordinary care contributing to his injury, or when the negligence of the defendant is not gross but only ordinary or slight when compared, under the circumstances of the case, with the contributory negligence of the plaintiff. *Chicago, etc., R. Co. v. Krueger*, 23 Ill. App. 639; *Chicago, etc., R. Co. v. Mason*, 27 Ill. App. 450; *Mt. Carmel v. Guthridge*, 52 Ill. App. 632; *Chicago, etc., R. Co. v. Fietsam*, 123 Ill. 518; *Chicago, etc., R. Co. v. Goebel*, 119 Ill. 515.

Status of Doctrine.—*Georgia.*—The doctrine of comparative negligence prevails in a modified form in Georgia, though it has never been accurately expressed there. "It is well settled that questions of negligence resulting in such injuries as those complained of are for the jury, and that a recovery may be defeated by its being shown that the injury was caused solely from the negligence of the plaintiff, or that he could by the exercise of ordinary care have avoided the consequences to himself, or that the defendant and its employees were in the exercise of all ordinary care and diligence, or in other cases than these, that the defendant will not be relieved, although the plaintiff may in some way have contributed to the injury sustained, but in that event the damages shall be diminished by the jury in proportion to the default attributable to him. Code, §§ 2972, 3033, 3034, and citations." *Branham v. Central R. Co.*, 78 Ga. 35. See also *Augusta, etc., R. Co. v. McElmurray*, 24 Ga. 75; *Macon, etc., R. Co. v. Davis*, 27 Ga. 113, 18 Ga. 679, 13 Ga. 68; *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409; *Central R., etc., Co. v. Dixon*, 42 Ga. 327; *Hendricks v. Western, etc., R. Co.*, 52 Ga. 467; *Atlanta, etc., R. Co. v. Ayers*, 53 Ga. 12; *Campbell v. Atlanta, etc., R. Co.*, 53 Ga. 488; *Thompson v. Central R., etc., Co.*, 54 Ga. 509; *Georgia, etc., R. Co. v. Neely*, 56 Ga. 540; *Rome v. Dodd*, 58 Ga. 238; *Southwestern R. Co. v. Johnson*, 60 Ga. 667; *Atlanta, etc., R. Co. v. Wyly*, 65 Ga. 120; *Georgia R. Co. v. Thomas*, 68 Ga. 744; *Central R. Co. v. Gleason*, 69 Ga. 200; *Central R. Co. v. Brinson*, 70 Ga. 207; *Savannah, etc., R. Co. v. Stewart*, 71 Ga. 427; *Savannah, etc., R. Co. v. Smith*, 93 Ga. 742.

Illinois.—The doctrine of comparative negligence was first developed as a common-law doctrine by the courts of Illinois, and was followed in that state in numerous cases though in a modified form, always tending toward the ordinarily accepted doctrine of contributory negligence. The doctrine has recently been held to be abrogated in that state. In the first case stating this doctrine, JUDGE BRESEE says: "The true doctrine, therefore, we think, is that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff; that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. Although these cases do not distinctly avow this doctrine in terms, there is a vein of it very perceptible running through very many of them, as where there are faults on both sides the plaintiff shall recover; his fault being measured by the defendant's negligence, the plaintiff need not be wholly without fault, as in *Raisin v. Mitchell*, 9 C. & P. 613, 38 E. C. L. 252, and *Lynch v. Nurdin*, 1 Q. B. 29, 41 E. C. L. 422. We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered, and wherever it shall appear that the plaintiff's negligence is comparatively slight and that of the defendant gross, he shall not be deprived of

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his action." *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 496. The doctrine stated in this case was modified in *Chicago, etc., R. Co. v. Johnson*, 103 Ill. 521; *Chicago v. Stearns*, 105 Ill. 554; *Abend v. Terre Haute, etc., R. Co.*, 111 Ill. 202, 53 Am. Rep. 616; *Calumet Iron, etc., Co. v. Martin*, 115 Ill. 358; *Chicago, etc., R. Co. v. Warner*, 123 Ill. 38; *Mansfield v. Moore*, 124 Ill. 138; *Willard v. Swansen*, 126 Ill. 381; *Chicago, etc., R. Co. v. Fisher*, 141 Ill. 614; *Lake Shore, etc., R. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218; *North Chicago St. R. Co. v. Williams*, 140 Ill. 275.

"It inevitably follows, from the rulings in the numerous cases to which we have referred, that the court has not understood that the rule of comparative negligence changed or modified the general rule requiring that the injured party, in order to recover for the negligence causing his injury, must have observed due or ordinary care for his personal safety, and authorizing him to recover for such injuries where he has observed such care." *Calumet Iron, etc., Co. v. Martin*, 115 Ill. 358.

"We held in the *Martin* case that where one has observed ordinary care, he has, even if slightly negligent, observed all the care the law requires of him, and that 'where, having observed this care, he is injured by the negligence of another, that other has been guilty of the degree of negligence for which the law charges responsibility.'" *Mansfield v. Moore*, 124 Ill. 138.

Existence of Rule Questioned.—"In respect to the first [instruction], it will only be necessary to say that, whether the doctrine of comparative negligence, as defined in *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478, and subsequent cases, has still a place in the jurisprudence of this state, and whether the later case of *Calumet Iron, etc., Co. v. Martin*, 115 Ill. 358, and other cases since decided, have not placed that doctrine upon a basis where it has become simply another form of stating the common-law rule of contributory negligence, need not be here discussed." *Pullman Palace Car Co. v. Laack*, 143 Ill. 257; *Atchison, etc., R. Co. v. Feehan*, 149 Ill. 214.

"We have repeatedly held, in effect, in the later decisions, beginning with *Calumet Iron, etc., Co. v. Martin*, 115 Ill. 358, that the doctrine of comparative negligence as announced in the earlier cases was no longer the law of this state, and it is to be no longer regarded as a correct rule of law, applicable in cases of this character." *Lake Shore, etc., R. Co. v. Hessions*, 150 Ill. 556.

Abrogated.—"The doctrine of comparative negligence is no longer the law of this court." *Lanark v. Dougherty*, 153 Ill. 165; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581; *Chicago, etc., R. Co. v. Matthews*, 153 Ill. 268; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 17; *Cicero, etc., St. R. Co. v. Meixner*, 160 Ill. 329.

Kansas.—"The earlier cases, when carefully examined, will be found to state the common-law doctrine of contributory negligence, only in a different form, and the slight neglect which would not bar a recovery was either not the proximate cause of the injury or did not amount to a want of ordinary care. *Union Pac. R. Co. v. Rollins*, 5 Kan. 167; *Sawyer v. Sauer*, 10 Kan. 466; *Pacific R. Co. v. Houts*, 12 Kan. 328; *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 38; *Mason v. Missouri Pac. R. Co.*, 27 Kan. 83, 41 Am. Rep. 405; *Wichita, etc., R. Co. v. Davis*, 37 Kan. 743, 1 Am. St. Rep. 275.

"This court has not adopted what is generally called the rule of comparative negligence." *Kansas Pac. R. Co. v. Peavey*, 29 Kan.

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170, 44 Am. Rep. 630, 11 Am. & Eng. R. Cas. 268; Atchison, etc., R. Co. v. Morgan, 31 Kan. 77, 13 Am. & Eng. R. Cas. 501; Howard v. Kansas City, etc., R. Co., 41 Kan. 408; Chicago, etc., R. Co. v. Brown, 44 Kan. 384; Atchison, etc., R. Co. v. Hughes, 55 Kan. 491; Atchison, etc., R. Co. v. O'Melia, 1 Kan. App. 385.

Kentucky.—The courts of Kentucky have not adopted the rule of comparative negligence. Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160, 42 Am. Rep. 208, 1 Am. & Eng. R. Cas. 79; Adams v. Louisville, etc., R. Co., 82 Ky. 603, 21 Am. & Eng. R. Cas. 380.

Some confusion has arisen in Kentucky, on account of the use of the terms "gross" and "wilful," in deciding cases arising under the statute as to injuries resulting in death caused by the wilful misconduct of the defendant. In such cases the defendant is liable for injuries resulting in death, notwithstanding the contributory negligence of the plaintiff. Kentucky Statutes of 1894, § 6; Louisville, etc., R. Co. v. Mahony, 7 Bush (Ky.) 235; Illinois Cent. R. Co. v. Dick, 91 Ky. 434.

Oregon.—Some of the earlier cases in Oregon seem to decide that slight negligence on the part of the plaintiff will not bar a recovery; but in such cases the slight negligence that was held not to bar a recovery was either not a proximate cause of the injury, or the plaintiff was nevertheless in the exercise of ordinary care. Bequette v. People's Transp. Co., 2 Oregon 200; Holstine v. Oregon, etc., R. Co., 8 Oregon 164.

The later cases seem to deny the rule. The doctrine in this state is thus set forth: "Besides, I do not concede that a party can recover in such a case when chargeable with any degree of negligence upon his part, if it directly contributes to the injury. A person may be negligent in an affair and still recover, on account of the negligence of another party, but not when his negligence is the proximate cause of the injury. The law does not enforce contribution between joint tortfeasors. However slight the negligence upon the part of a plaintiff may be, if it be such that but for that negligence the misfortune could not have happened, he cannot recover. But if the injury would have happened if his want of care had not contributed thereto, there may be a liability." Hurst v. Burnside, 12 Oregon 520; Cassida v. Oregon R., etc., Co., 14 Oregon 551; Ford v. Umatilla County, 15 Oregon 319.

Tennessee.—The doctrine of comparative negligence does not prevail in Tennessee, but a peculiar modification of the rule of contributory negligence obtains. Whirley v. Whiteman, 1 Head (Tenn.) 610; Nashville, etc., R. Co. v. Carroll, 6 Heisk. (Tenn.) 367; East Tennessee, etc., R. Co. v. Toppins, 10 Lea (Tenn.) 65; East Tennessee, etc., R. Co. v. Gurley, 12 Lea (Tenn.) 46; East Tennessee, etc., R. Co. v. Hull, 88 Tenn. 33, 41 Am. & Eng. R. Cas. 495; East Tennessee, etc., R. Co. v. Aiken, 89 Tenn. 245.

The rule in Tennessee is, that negligence on the part of the plaintiff contributing to his injury as the proximate cause thereof will bar a recovery; but that although guilty of some negligence, yet if he could not by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he may recover. But his negligence will be taken into consideration in mitigation of damages, and this rule does not permit a recovery in any case where the parties are equally blamable. Louisville, etc., R. Co. v. Burke, 6 Coldw. (Tenn.) 45; Nashville, etc., R. Co. v. Smith, 11 Heisk.

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(Tenn.) 455; Louisville, etc., R. Co. v. Conner, 2 Bart. (Tenn.) 382; Nashville, etc., R. Co. v. Nowlin, 1 Lea (Tenn.) 523; Nashville, etc., R. Co. v. Smith, 9 Lea (Tenn.) 470; East Tennessee, etc., R. Co. v. Fain, 12 Lea (Tenn.) 35, 19 Am. & Eng. R. Cas. 105; East Tennessee, etc., R. Co. v. Humphreys, 12 Lea (Tenn.) 200; East Tennessee, etc., R. Co. v. Stewart, 13 Lea (Tenn.) 432, 21 Am. & Eng. R. Cas. 618; Jackson v. Nashville, etc., R. Co., 13 Lea (Tenn.) 491, 49 Am. Rep. 663; Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas. 347; East Tennessee, etc., R. Co. v. Winters, 85 Tenn. 240; Nashville, etc., R. Co. v. Seaborn, 85 Tenn. 396; East Tennessee, etc., R. Co. v. De Armond, 86 Tenn. 73, 6 Am. St. Rep. 816.

Other States.—The doctrine of comparative negligence is denied by the courts of most of the states. Gothard v. Alabama G. S. R. Co., 67 Ala. 114; Frazer v. South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145, 28 Am. & Eng. R. Cas. 565; Prescott, etc., R. Co. v. Rees, (Arizona, 1892) 28 Pac. Rep. 1134; Needham v. San Francisco, etc., R. Co., 37 Cal. 409; Robinson v. Western Pac. R. Co., 48 Cal. 409; Strong v. Sacramento, etc., R. Co., 61 Cal. 326; Holmes v. South Pac. Coast, etc., R. Co., 97 Cal. 161; Western Union Tel. Co. v. Eyser, 2 Colo. 141; Rowen v. New York, etc., R. Co., 59 Conn. 364; Ogle v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 267; Jefferson v. Brady, 4 Houst. (Del.) 645; Terre Haute, etc., R. Co. v. Graham, 95 Ind. 293, 12 Am. & Eng. R. Cas. 77, 48 Am. Rep. 719; Louisville, etc., R. Co. v. Falvey, 104 Ind. 434; O'Keefe v. Chicago, etc., R. Co., 32 Iowa 467, 10 Am. Ry. Rep. 63; Johnson v. Tillson, 36 Iowa 89; Artz v. Chicago, etc., R. Co., 38 Iowa 293; Lang v. Holiday Creek R. Co., 42 Iowa 677; Fenneman v. Holden, 75 Md. 1; Marble v. Ross, 124 Mass. 44; Lake Shore, etc., R. Co. v. Miller, 25 Mich. 277; Mynning v. Detroit, etc., R. Co., 59 Mich. 257; Matta v. Chicago, etc., R. Co., 69 Mich. 109, 32 Am. & Eng. R. Cas. 71; Welch v. McAllister, 13 Mo. App. 89; Brooks v. Hannibal, etc., R. Co., 35 Mo. App. 571; Hurt v. St. Louis, etc., R. Co., 94 Mo. 255, 4 Am. St. Rep. 374, 34 Am. & Eng. R. Cas. 422; Omaha Horse R. Co. v. Doolittle, 7 Neb. 481; State v. Manchester, etc., R. Co., 52 N. H. 528; Pennsylvania R. Co. v. Righter, 42 N. J. L. 180, 2 Am. & Eng. R. Cas. 220; Wilds v. Hudson River R. Co., 24 New York 432; Little Schuylkill Nav. R., etc., Co. v. Norton, 24 Pa. St. 465, 64 Am. Dec. 672; Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239, 98 Am. Dec. 336; Potter v. Warner, 91 Pa. St. 362, 36 Am. Rep. 668; Monongahela City v. Fischer, 111 Pa. St. 9; Lehigh Valley R. Co. v. Greiner, 113 Pa. St. 600; Long v. Milford Tp., 137 Pa. St. 122; Houston, etc., R. Co. v. Gorbett, 49 Tex. 573; McDonald v. International, etc., R. Co., 86 Tex. 1, 40 Am. St. Rep. 803; Galveston, etc., R. Co. v. Thornsberry, (Tex. 1891) 17 S. W. Rep. 521; Boyd v. Burkett, (Tex. Civ. App. 1894) 27 S. W. Rep. 223; Turner v. Ft. Worth, etc., R. Co., (Tex. Civ. App. 1895) 30 S. W. Rep. 253; Potter v. Chicago, etc., R. Co., 21 Wis. 372, 94 Am. Dec. 548; Otis v. Janesville, 47 Wis. 422; Dittberner v. Chicago, etc., R. Co., 47 Wis. 138; Bloor v. Delafield, 69 Wis. 273.

Federal Courts.—The Supreme Court of the United States adheres to the rule of contributory negligence. New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357; Sioux City, etc., R. Co. v. Stout, 17 Wall. (U. S.) 660.

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England.—The courts of England have never departed from the rule of contributory negligence. *Butterfield v. Forrester*, 11 East 60; *Bridge v. Grand Junction R. Co.*, 3 M. & W. 245; *Davies v. Mann*, 10 M. & W. 546.

ATCHISON, T. & S. F. R. Co.

v.

KANSAS FARMERS' INS. CO.

(*Court of Appeals of Kansas, Southern Depart. E. D., June 15, 1898.*)

Damage by Fire—Abandoned Cause of Action—Appeal.—Where the plaintiff, while a motion to make the petition more definite and certain was pending, under leave of the court, struck out, voluntarily, from its petition, an allegation as to subrogation, and where the case was thereafter tried as upon a direct written assignment of the cause of action, *held*, that the question as to the right of subrogation is eliminated, and cannot be considered in this court.

Torts—Assignment of Right of Action.*—"Under our statutes, a right of action against a party for negligently and wrongfully destroying property by fire is not assignable." *Railway Co. v. Brehm*, 39 Pac. 690, 54 Kan. 751.

(Syllabus by the Court.)

ERROR by defendant from Elk county district court.
Reversed.

A. A. Hurd and *Stambaugh & Hurd*, for plaintiff
in error.

Douthitt & Ayres, for defendant in error.

MILTON, J., in delivering the opinion of the court said: The question as to assignability of a cause of action arising from a tort has been settled by the supreme court of this state. In *Railway v. Brehm*, 54 Kan. 751, 39 Pac. 690, the syllabus reads: "Under our statutes, a right of action against a party for negligently and wrongfully destroying property by fire is not assignable." In *McCrum v. Corby*, 11 Kan. 464, 470, it was said: "Under our statutes, every chose in action is assignable except a tort, the same as it was in equity." The decision in *Chicago, B. & Q. R. Co. v. German Ins. Co.*, 2 Kan. App. 395, 42 Pac. 594, which is cited by counsel for defendant in error does not appear to be applicable to the present case. There the insurance company did not sue as an assignee, but claimed to derive its right of action by subrogation.

*See note at end of case.

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NOTE.

A right of action against a railroad, for carelessly and negligently setting fire to and burning up, grass, fences, etc., is assignable. *Fried v. New York Cent. R. Co.*, 25 How. Pr. (Buffalo Super. Ct.) 285; *Tyler v. Ricamore*, 87 Va. 466. See also *Small v. Chicago*, etc., R. Co., 55 Iowa 582.

A right of action for a tort, however, is not, as a rule, assignable.—See 10 Am. & Eng. R. Cas., N. S., note, 860.

HARDISON

v.

ATLANTIC & N. C. R. CO.

(Supreme Court of North Carolina, Feb. 16, 1897.)

Killing Stock on Track—Statutory Presumption of Negligence*—Question for Jury.—Where plaintiff made a *prima facie* case of negligence against defendant in causing the death of plaintiff's cow, by showing that she was killed by defendant's train, and complied with section 2326 of the Code of North Carolina, which requires such action to be brought within six months of the discovery of the accident by plaintiff, and defendant introduced evidence tending to show his innocence in the premises, an issue of fact was created, and it was error to direct a verdict for defendant.

APPEAL from Craven county superior court. *Reversed.*

L. J. Moore and *D. L. Ward*, for appellant.

P. M. Pearsall and *Clark & Guion*, for appellee.

FURCHES J., in delivering the opinion of the court said: "When the plaintiff showed the killing, and that the action had been commenced within less than six months thereafter, this, in law, made a *prima facie* case of negligence against the defendant. Section 2326 of the Code. Under this statute, as we understand it, at the close of plaintiff's evidence (if the defendant had introduced no evidence), it would have been the duty of the court to instruct the jury to find the first issue for the plaintiff; but, as the defendant introduced evidence tending to show there was no negligence on the part of defendant in killing the cow,—that is, to rebut the presumption or *prima facie* case of the plaintiff,—it then became an issue of fact, which could not be found by the court, and should have been left to the jury."

*See note at end of case.

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NOTE.

Killing Stock on Track—Statutory Presumption of Negligence—Burden of Proof.—Proof that stock were injured by a running train establishes a *prima facie* case of negligence, and casts the burden on the company to overthrow this by proof of proper diligence. Alabama G. S. R. Co. v. McAlpine, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113; Birmingham Mineral R. Co. v. Harris, 98 Ala. 326.

It being shown that the animal, for the negligent killing of which the action was brought, was on the railroad track when it was struck and killed (Alabama Code, § 1147), the *onus* is on the defendant to acquit itself of the charge of negligence. Louisville & N. R. Co. v. Kelsey, 42 Am. & Eng. R. Cas. 584, 89 Ala. 288, 7 So. Rep. 648.

The presumption of negligence is against the railroad company, and the burden of proof upon it to show the contrary, even where the animal killed was in a pasture inclosed on both sides of the railroad. Woodfolk v. Macon & A. R. Co., 56 Ga. 457.

Where it was proved that a cow was killed by a train, this imposed on the company the burden of showing that it was in the exercise of all ordinary and reasonable care and diligence, or that the damage was caused solely by the negligence of the owner of the cow, or, to diminish damages, that both were at fault. Negligence is a question for the jury, and the issues thus presented necessarily depend upon facts. Therefore, where the plaintiff obtained a verdict on the appeal trial in a justice's court, and the defendant carried the case to the superior court by *certiorari*, if the judge sustained the *certiorari*, it was proper to order a new trial and not to finally dispose of the case. Georgia R. Co. v. Bird, 76 Ga. 13.

The burden of proof under the Illinois statute is upon the company to disprove negligence upon its part where the evidence shows that the stock was killed within the limits of a city, town, or village, while the train was running at a rate of speed prohibited by the city ordinance. Toledo, P. & W. R. Co. v. Deacon, 63 Ill. 91, 7 Am. Ry. Rep. 150.

In an action under § 1, of article 77, of the Maryland Code, negligence is imputed to the railroad company, and the burden of proof is on the company to negative this imputation, and to establish affirmatively that the injury complained of resulted from a disaster which could not have been avoided by the use of proper care and diligence on the part of its agents, and that such proper care and diligence were observed by them. Northern C. R. Co. v. Ward, 63 Md. 362.

Where suit is under the Mississippi Code, § 1059, to recover for stock killed, proof of killing casts the burden on the defendant to disprove negligence. Louisville, N. O. & T. R. Co. v. Smith, 67 Miss. 15, 7 So. Rep. 212.

The rule in Danner's Case, that mere proof that cattle were killed upon a railroad track by the train of the company is sufficient to throw the *onus* of showing that there was no negligence on the company, held applicable to a case of the killing of a horse at night. Murray v. South Carolina R. Co., 10 Rich. (So. Car.) 227.

Under the Arkansas statute, the burden is on defendant railroad company to show reasonable care and diligence in the management of its train, where it appears that stock had been killed. St. Louis, I. M. & S. R. Co. v. Vincent, 36 Ark. 451; Kansas City, S. & M. R.

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Co. v. Summers, 45 Ark. 295; Memphis & L. R. R. Co. v. Jones, 36 Ark. 87.

Where cattle are attracted by cotton seed which has been permitted to accumulate near a railroad track, a *prima facie* case of negligence is made by proof of the killing under the Arkansas statute, the burden of overcoming which, by showing that the company's servants used reasonable care to avert the injury, is upon the company. Little Rock & Ft. S. R. Co. v. Dick, 42 Am. & Eng. R. Cas. 591, 52 Ark. 402, 12 S. W. Rep. 785.

Where the driver of a team of mules was using the right of way of a railroad company between its main and side-tracks for the purpose of unloading freight from one of its cars, having gone there upon invitation of the company, and one of the mules was struck and killed by a passing engine, the court properly instructed the jury that the fact of the killing made a *prima facie* case of negligence under the Arkansas statute, which cast upon the company the burden of showing that it had used due care. St. Louis, I. M. & S. R. Co. v. Taylor, 57 Ark. 136.

The burden of proof was on the defendant, in an action against a railroad company for damages for killing a mare, the killing being admitted by the defendant. The admission of killing by the defendant being made *prima facie* evidence of carelessness and negligence of the company by § 5, ch. 57, Gen. St. Ky., the burden was on the defendant to show that the killing was done without actionable fault on the part of the company. Louisville & N. R. Co. v. Brown, 13 Bush (Ky.) 475.

If the cattle of a landowner, being rightfully on a railroad crossing, are killed by the engines of the corporation, their destruction is *prima facie* evidence of negligence, and the burden is thrown upon the corporation to show that the injury was occasioned without any fault on its part. Gross negligence need not be shown in order to sustain an action for the injury. White v. Concord R. Co., 30 N. H. 188.

CENTRAL OF GEORGIA RY. CO.

v.

WOOD.

(Supreme Court of Georgia, June 8, 1898.)

Killing of Stock on Track—Presumption of Negligence*—Evidence.—This being an action against a railway company for the killing of live stock by a train, in which the plaintiff's alleged right to recover depended upon the presumption of negligence raised by law against the defendant, and the uncontradicted evidence in its behalf showing that its servants in charge of the train exercised ordinary care and diligence in endeavoring to prevent the collision, this presumption was rebutted; and consequently the verdict against the company was contrary to law, and should have been set aside.

(Syllabus by the Court.)

ERROR by defendant from superior court Washington county. *Reversed.*

See note at end of case.

Abstracts

Lawton & Cunningham and Rawlings & Hardwick,
for plaintiff in error.

Evans & Evans, for defendant in error.

PER CURIAM. Judgment reversed.

NOTE.

Killing of Stock on Track—Negligence—Presumption.—(1) *At common law.*—At common law proof of injury to, or killing of, stock on the track raises no presumption of negligence. Such presumption exists only under the statutes. *Eddy v. Lafayette*, 49 Fed. Rep. 798, 4 U. S. App. 243, 1 C. C. A. 432.

Where the cattle-owner pursues the common-law remedy instead of his statutory remedy, mere proof of killing or injury by the company does not raise a presumption of negligence. *Denver & R. G. R. Co. v. Henderson*, 31 Am. & Eng. R. Cas. 559, 10 Colo. 1, 13 Pac. Rep. 910. *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319, 9 Pac. Rep. 351. *Indianapolis & C. R. Co. v. Means*, 14 Ind. 30; *Mobile & O. R. Co. v. Hudson*, 50 Miss. 572.

In an action by an owner of live stock for killing or injuring the stock by its train, proof of the killing or injury is not of itself *prima facie* evidence of negligence upon the part of the company or its agents. To make out a *prima facie* case of negligence there must at least be evidence of circumstances from which a presumption arises that the stock would not have been run upon by the train but for want of care on the part of those operating it. *Savannah, F. & W. R. Co. v. Geiger*, 29 Am. & Eng. R. Cas. 274, 21 Fla. 669, 58 Am. Rep. 697.

Where no duty is imposed on the company to fence in its track, mere proof of killing or injury does not raise a presumption of negligence. *Illinois C. R. Co. v. Reedy*, 17 Ill. 580; *Schneir v. Chicago, R. I. & P. R. Co.*, 40 Iowa 337.

(2) *The South Carolina rule.*—Where a company is sued for killing cattle, proof by plaintiff that his cattle were killed by a passenger train belonging to the company while pasturing on his own land, and of the value of the cattle, makes out a *prima facie* case which will entitle him to recover, unless the company rebuts the presumption of negligence by proof of the particular circumstances or manner of the killing. *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 329.

Proof of ownership of stock by plaintiff, and of the killing by defendant, makes out a *prima facie* case, and where the company produces no evidence in defense a nonsuit should be denied. *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52; *Roof v. Charlotte, C. & A. R. Co.*, 4 So. Car. 61; *Compare Nashville & C. R. Co. v. Fugett*, 3 Coldw. (Tenn.) 402.

And this presumption of negligence is not confined to cases where the company introduces no testimony whatever, but continues until rebutted by affirmative evidence that the company exercised due care, or that the accident was unavoidable. *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52.

This rule in *Danner's Case*, that proof of killing stock raises a presumption of negligence and unexplained, entitles the owner to recover, is not changed by the subsequent South Carolina laws

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requiring stock to be inclosed. *Simkins v. Columbia & G. R. Co.*, 19 Am. & Eng. R. Cas. 467, 20 So. Car. 258; *Jones v. Columbia & G. R. Co.*, 19 Am. & Eng. R. Cas. 459, 20 So. Car. 249.

(3) *Alabama statute*.—Proof that stock were injured by a passing train makes out a *prima facie* case under the Alabama statutes, and casts the burden on the company to show that there was no negligence, or that the statute had been complied with. *East Tenn., V. & G. R. Co. v. Bayliss*, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150; *Alabama G. S. R. Co. v. McAlpine*, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113; *Nashville, C. & St. L. R. Co. v. Hembree*, 38 Am. & Eng. R. Cas. 300, 85 Ala. 481, 5 So. Rep. 173; *Mobile & G. R. Co. v. Caldwell*, 83 Ala. 196, 3 So. Rep. 445.

(4) *Arkansas statute*.—Under the Arkansas act of Feb. 3, 1875, proof that stock were killed on the track raises a presumption of negligence and that the killing was done by the company's train, but this presumption is not conclusive. *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816; *Little Rock & Ft. S. R. Co. v. Finley*, 11 Am. & Eng. R. Cas. 469, 37 Ark. 562; *Little Rock & Ft. S. R. Co. v. Jones*, 19 Am. & Eng. R. Cas. 443, 41 Ark. 157; *St. Louis, I. M. & S. R. Co. v. Hagan*, 19 Am. & Eng. R. Cas. 446, 42 Ark. 122; *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136.

The fact that stock are found near a railroad, wounded, creates no presumption that the injury was done by the railroad train, as in cases of killing or mortally wounding stock; but when it is proved that the injury was done by the train, then the same presumption of negligence arises against the company as in cases of killing. *St. Louis, I. M. & S. R. Co. v. Hagan*, 19 Am. & Eng. R. Cas. 446, 42 Ark. 122.

But this presumption may be repelled by proof of due diligence. *St. Louis & S. F. R. Co. v. Basham*, 47 Ark. 321, 1 S. W. Rep. 555.

A *prima facie* case of negligence is made under the Arkansas statute by proving the killing, and that the animals were attracted by cotton-seed which was allowed to accumulate upon the track. *Little Rock & Ft. S. R. Co. v. Dick*, 42 Am. & Eng. R. Cas. 591, 52 Ark. 402, 12 S. W. Rep. 785.

(5) *Florida statute*.—Under the act of 1887, chapter 3740, laws of Florida, the killing of live stock by a railway engine, cars, or train is *prima facie* evidence of negligence on the part of the company operating the engine or train, and where the testimony shows that live stock were killed by a train of cars on a railroad, and there is nothing in the evidence to relieve the killing from the statutory presumption that it was negligently done, it is sufficient to sustain a judgment against the company. *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 Fla. 567, 11 So. Rep. 926.

(6) *Georgia statute*.—The mere fact that animals were killed by a train, especially where the law makes it the duty of all persons to maintain a fence, and there was none in this case, is sufficient to raise a presumption of negligence on the part of the railroad's employees. *Georgia R. & B. Co. v. Willis*, 28 Ga. 317.

Under the Georgia Code, § 3033, the killing of an animal by a running train raises the presumption that the accident occurred through the negligence of the railroad or its employees. *Georgia R. & B. Co. v. Monroe*, 49 Ga. 373.

But this presumption is subject to be rebutted and overcome by evidence; and where this has been done by the uncontradicted

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testimony of the employees of the company, a verdict finding against it is contrary to law and evidence. *Georgia R. & B. Co. v. Wall*, 80 Ga. 202, 7 S. E. Rep. 639.

And where this presumption was fully rebutted by the testimony on behalf of the company, to the effect that the injury was not the result of negligence on the part of the defendant or its agents, but that it used all ordinary and reasonable care and diligence to prevent the injury, and where this was not contradicted by any other evidence, a new trial should have been granted on the ground that the verdict was without evidence to support it. *Macon & A. R. Co. v. Newell*, 74 Ga. 809.

(7) *Illinois statute*.—Where the plaintiff declares upon the statutory liability growing out of the neglect to fence the road within six months after it is opened, it is sufficient to prove the killing of the cattle by the trains of the company and the company's neglect to fence. Such proof makes a *prima facie* case of liability. *Rockford, R. I. & St. L. R. Co. v. Lynch*, 67 Ill. 149.

The law infers negligence where animals are killed at a point where it is the duty of the company to fence under the Illinois statute and it has failed to do so; but where a fence has once been built then negligence must be proven, as in failing to keep it in repair, etc. *Illinois C. R. Co. v. Whalan*, 42 Ill. 396.

(8) *Iowa statute*.—Under the Iowa Code, § 1289, the fact of injury or killing of an animal by a railroad train being shown raises a presumption of negligence against the railroad company. *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa 338. *Brentner v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 448, 68 Iowa 530, 23 N. W. Rep. 245, 27 N. W. Rep. 605.

(9) *Kentucky statute*.—Under the Kentucky statute the killing of live stock raises the presumption of negligence against the railroad company whose train causes the injury. *Louisville & N. R. Co. v. Simmons*, 85 Ky. 151, 3 S. W. Rep. 10.

(10) *Maryland statute*.—Upon proof of injury to the stock of the plaintiff by a railroad company, a *prima facie* case is made, and the plaintiff is entitled under the statute (Art. 77, § 1, of the Maryland Code) to recover, unless the defendant can prove, to the satisfaction of the jury, "that the injury complained of was committed without any negligence on the part of the company or its agents." *Western Md. R. Co. v. Carter*, 13 Am. & Eng. R. Cas. 573, 59 Md. 306. *Keech v. Baltimore & W. R. Co.*, 17 Md. 32; *Northern C. R. Co. v. Ward*, 63 Md. 362.

(11) *Mississippi statute*.—Proof of the killing of stock and of its value makes a *prima facie* case for plaintiff under the Mississippi statute (Code of 1880, § 1059), thus casting the burden on the company to show circumstances of excuse or justification of the killing. *Kansas City, M. & B. R. Co. v. Doggett*, 67 Miss. 250, 7 So. Rep. 278. *Vicksburg & M. R. Co. v. Hamilton*, 62 Miss. 503. *Mobile & O. R. Co. v. Dale*, 61 Miss. 206.

(12) *Missouri statute*.—The usual presumption of negligence that arises on proof that stock were killed on the track, under the Missouri statute, does not apply where the killing is within the corporate limits of a village or city. *Pryor v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 215.

Especially when the accident happened at a crossing long used as a public highway. *Wier v. St. Louis & I. M. R. Co.*, 48 Mo. 558.

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(13) *New Hampshire statute*.—Proof of killing by the engines of a railroad company establishes a *prima facie* case where the animals were upon a railroad crossing (New Hampshire Comp. St., ch. 150, § 45). *White v. Concord R. Co.*, 30 N. H. 188.

The destruction of cattle while upon the track of a railroad, without the fault of their owner, is competent *prima facie* evidence of negligence on the part of the railroad corporation running the train causing the mischief (New Hampshire Comp. St. 350.) *Smith v. Eastern R. Co.*, 35 N. H. 356.

(14) *North Carolina statute*.—Where it was proven or admitted that cattle had been killed by the train within six months before the action was brought, there is a presumption that the killing was caused by the negligence of such company, and this presumption arises from the fact of killing (under § 2326 of the North Carolina Code), where the animal is hitched to a wagon or cart, as well as where it is straying at large when killed. *Randall v. Richmond & D. R. Co.*, 45 Am. & Eng. R. Cas. 507, 107 N. Car. 748, 12 S. E. Rep. 605.

Where an action for killing plaintiff's mule is brought within six months after the accident, the fact of such killing (nothing further appearing) is *prima facie* evidence of defendant's negligence; and the burden of repelling the presumption is upon the company. *Wilson v. Norfolk & S. R. Co.*, 19 Am. & Eng. R. Cas. 453, 90 N. Car. 69.

The North Carolina act of 1857 (Bat. Rev. ch. 16, § 11), which makes the act of killing stock by the engines or cars of a railroad company *prima facie* evidence of negligence, applies only when the facts attending the killing are unknown and uncertain; but when those facts are fully disclosed in evidence, and it is shown that the defendant company adopted every precaution in its power to avert the injury, the court should instruct the jury that the defendant is not chargeable with negligence. *Durham v. Wilmington & W. R. Co.*, 82 N. Car. 352.

MISSOURI, K. & T. RY. CO.

v.

FARRINGTON.

(Court of Appeals of Indian Territory, Jan. 8, 1898.)

Injury to Stock—Lookouts—Negligence—Question for Jury.*—In an action against a railroad to recover the value of a cow killed by defendant's engine, the evidence was conflicting, but tended to show that the engineer was negligent in failing to see the animal, and in failing to check speed. *Held*,—that the question whether or not the killing was the result of defendant's negligence was properly submitted to the jury.

*See *Johnson v. Great Northern Ry. Co.*, 11 Am. & Eng. R. Cas. N. S., 76, and *note*, 80 *et seq.*

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APPEAL by defendant from the United States court for the Northern district of the Indian Territory. *Affirmed.*

TOWNSEND, D. J. in delivering the opinion of the court, said: "There is some conflict in the evidence in this case as to the distance the train was from the cow when the cow got upon the track, and also as to the speed the train was running. The evidence of the plaintiff is that the train was 200 yards from the cow when she got upon the track, and the evidence of the engineer is that she was about 90 feet from the engine; that she got off the track, and he thought she would remain off, but that she came back on the track when the engine was about 50 feet from her. The evidence is that there was a slight curve, but it was upon the prairie, and the view unobstructed, and, as witness White testified, the "engineer could have seen a dog." The evidence further is that the train made no effort to slacken its speed, but, as it approached the cow, rather increased it, and the speed they were running is estimated from 10 miles per hour, by defendant's witness, to 40 miles per hour, by plaintiff's witnesses. The evidence, we think, properly went to the jury, and it is the province of the jury to say whether the circumstances are sufficient to warrant a finding that the cow was killed through the negligence of the railway company. The duty of railway companies to keep a lookout for stock on their tracks is no longer an open question. We think the charge of the court properly stated the law to the jury. The questions involved in this case are fully discussed in *Railway Co. v. Ellis*, 10 U. S. App. 640, 4 C. C. A. 454, and 54 Fed. 481; *Railway Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, and 49 Fed. 347; *Railway Co. v. Elledge*, 4 U. S. App. 136, 1 C. C. A. 295, and 49 Fed. 356; *Railway Co. v. Johnson*, 10 U. S. App. 629, 4 C. C. A. 447, and 54 Fed. 474. and cases cited."

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GEORGIA RAILROAD & BANKING CO.

v.

CLARY.

(Supreme Court of Georgia, March 23, 1898.)

Stock Killed Beyond Crossing—Failure to Give Signals—Whether Negligence Per Se.*—In the trial of an action against a railroad company for damages claimed to have been sustained by the killing of a horse upon the track of the company, 135 yards beyond a public road crossing, it was error to charge the jury as follows: "If, at the time or after the engine reached the blow post for this crossing, the horse came upon the railroad crossing, and the engineer did not blow the whistle of his engine, and did not slacken the speed of his train, and if, by blowing the whistle and slackening the speed of his train, the accident could have been avoided, that would be a lack of diligence, for which the railroad company would be liable." Such a charge was equivalent to instructing the jury that the facts recited would show the defendant company to have been negligent. Whether or not the defendant company was negligent, was a question for the jury.

(Syllabus by the Court.)

ERROR by defendant from Columbia county superior court. *Reversed.*

Jos. B. & Bryan Cumming and *M. P. Reese*, for plaintiff in error.

John T. West, for defendant in error.

SIMMONS C. J., in delivering the opinion of the court said: "The charge set out in the headnote is clearly erroneous, when taken in connection with the facts disclosed in the record. Relatively to a person or thing on a railroad track, 135 yards beyond the crossing, it is not negligence, *per se*, for the servant of the railroad company to fail to check the train and blow the whistle before arriving at the crossing. *Railway Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550; *Railroad Co. v. Golden*, 93 Ga. 510, 21 S. E. 68. A failure to check the train and to blow the whistle is admissible in evidence, and may be considered by the jury, as was held in both of the cases just cited. When, therefore, the trial judge instructed the jury that, if the servants of the company fail to check and blow, it was a lack of diligence, such charge was equivalent to instructing them that such failure on the part of the servants of the

*See notes at end of case.

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company would be negligence. In this state negligence is a question for the jury only; and the judge cannot, except in certain cases, tell the jury that such and such acts constitute negligence. If, in the present case, the horse had been killed upon the crossing, the trial judge could have instructed the jury that the failure to blow the whistle and check the train was negligence *per se*; for the statute requires that these things be done in approaching a crossing, and a failure to do so is made a penal offense. But where the horse was killed 135 yards beyond the crossing, relatively to it or its owner, it was not negligence *per se* to fail to blow and check."

NOTES.

Failure to Obey Statutory Requirements in Regard to Signals and Speed at Crossings—Degrees of Negligence.—*Negligence Per Se*—When a railway company violates the requirements of a statute as to ringing the bell or sounding the whistle of its locomotive at a crossing, such violation is negligence *per se*, and where a person is killed by its locomotive while crossing a highway, street, or traveled place, it will be presumed that such negligence caused the death. *Strother v. South Carolina & G. R. Co.*, 5 Am. & Eng. R. Cas., N. S., 430, and *note* 441.

Omission of the company to perform its statutory duty in regard to the giving of signals has been termed negligence *per se* or as a conclusion of law. *Atlantic, etc., R. Co. v. Wyly*, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262; *Terre Haute, etc., R. Co. v. Voelker*, 129 Ill. 540, 39 Am. & Eng. R. Cas. 615, *affirming* 31 Ill. App. 314; *Pittsburg, etc., R. Co. v. Martin*, 82 Ind. 476, 8 Am. & Eng. R. Cas. 253; *Chicago, etc., R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761, 23 Am. & Eng. R. Cas. 282; *Cincinnati, etc., R. Co. v. Butler*, 103 Ind. 31, 23 Am. & Eng. R. Cas. 262; *Pittsburg, etc., R. Co. v. Shaw*, 15 Ind. App. 173; *Reed v. Chicago, etc., R. Co.*, 74 Iowa 188; *Philadelphia, etc., R. Co. v. Stinger*, 78 Pa. St. 219; *Strother v. South Carolina, etc., R. Co.*, 47 S. Car. 375; *Texas, etc., R. Co. v. Howard*, 2 Tex. Unrep. Cas. 429; *Texas, etc., R. Co. v. Anderson*, 2 Tex. App. Civ. Cas. § 202; *Galveston, etc., R. Co. v. Cook*, (Tex. 1891) 16 S. W. Rep. 1038; *Houston, etc., R. Co. v. Rogers*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1112; *Nuzum v. Pittsburg, etc., R. Co.*, 30 W. Va. 228.

While negligence, as a general rule, is a question for the jury, yet where the statute makes a certain act, having a material bearing on the case, imperative upon the agents of a railroad company, the court may instruct the jury that proper diligence required such act. *Atlanta, etc., R. Co. v. Wyly*, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262; *Chicago, etc., R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761, 23 Am. & Eng. R. Cas. 282.

Contra.—*Chicago, etc., R. Co. v. Houston*, 95 U. S. 697; *Galena, etc., Union R. Co. v. Dill*, 22 Ill. 271; *Illinois Cent. R. Co. v. Phelps*, 29 Ill. 447; *Chicago, etc., R. Co. v. McKean*, 40 Ill. 218; *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576; *Toledo, etc., R. Co. v. Jones*, 76 Ill. 311; *Chicago, etc., R. Co. v. Harwood*, 90 Ill. 425; *Artz v. Chicago, etc.,*

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R. Co., 34 Iowa 154; Atchison, etc., R. Co. v. Morgan, 31 Kan. 77, 13 Am. & Eng. R. Cas. 499; Huckshold v. St. Louis, etc., R. Co., 90 Mo. 548, 28 Am. & Eng. R. Cas. 659; Missouri Pac. R. Co. v. Geist, 49 Neb. 489; Omaha, etc., Valley R. Co. v. Talbot, 48 Neb. 627; Pakalinsky v. New York Cent., etc., R. Co., 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251; Chrystal v. Troy, etc., R. Co., 124 N. Y. 519; Steves v. Oswego, etc., R. Co., 18 N. Y. 422; Parker v. Wilmington, etc., R. Co., 86 N. Car. 221, 8 Am. & Eng. R. Cas. 420; Cleveland, etc., R. Co. v. Elliott, 28 Ohio St. 340; Texas, etc., R. Co. v. Wright, 62 Tex. 515, 23 Am. & Eng. R. Cas. 304; Central Texas, etc., R. Co. v. Nycum, (Tex. Civ. App. 1896) 34 S.W. Rep. 460.

Mere negligence, followed by an accident, will not render the company liable in those cases where such negligence did not cause the accident. Atchison, etc., R. Co. v. Morgan, 31 Kan. 77, 13 Am. & Eng. R. Cas. 499 and *note*, pp. 502, 503; Stepp v. Chicago, etc., R. Co., 85 Mo. 229; Karle v. Kansas City, etc., R. Co., 55 Mo. 476; Reynolds v. New York Cent., etc., R. Co., 58 N. Y. 248. See also Harlan v. St. Louis, etc., R. Co., 65 Mo. 22.

The failure to ring a bell on a moving railroad engine, as required by a city ordinance, constitutes negligence. Such negligence alone will warrant a recovery when it appears that obedience to the requirements of the ordinance would have prevented the injury sued for, but not otherwise. Hanlon v. Missouri Pac. R. Co., 104 Mo. 381.

See also Missouri Pac. Ry. Co. v. Geist, 5 Am. & Eng. R. Cas., N. S., 421.

Prima Facie Negligence.—In some cases the failure to give the statutory signals at crossings has been termed *prima facie* negligence. Orcutt v. Pacific Coast R. Co., 85 Cal. 291; Galena, etc., Union R. Co. v. Loomis, 13 Ill. 549, 56 Am. Dec. 471; Illinois Cent. R. Co. v. Gillis, 68 Ill. 317; Terre Haute, etc., R. Co. v. Barr, 31 Ill. App. 57; Terre Haute, etc., R. Co. v. Black, 18 Ill. App. 45; St. Louis, etc., R. Co. v. Terhune, 50 Ill. 151, 99 Am. Dec. 504; Great Western R. Co. v. Geddis, 33 Ill. 304; Barr v. Hannibal, etc., R. Co., 30 Mo. App. 248; Huckshold v. St. Louis, etc., R. Co., 90 Mo. 548, 28 Am. & Eng. R. Cas. 659; Gulf, etc., R. Co. v. Breitling, (Tex. 1890) 12 S. W. Rep. 1121.

Compare Chicago, etc., R. Co. v. Brady, (Neb. 1897) 71 N. W. Rep. 721, where it was held that it was error to instruct the jury that a failure to give the signals required by statute was *prima facie* evidence of negligence.

Where an injury at a railroad crossing is caused by a locomotive upon which the statutory requirements as to signals have been neglected, the railroad company operating the locomotive is *prima facie* liable for such injury, unless the person sustaining it contributed thereto by his own negligence; and it need not be further proved by the plaintiff that the failure to ring the bell or blow the whistle was the proximate cause of the injury. Orcutt v. Pacific Coast R. Co., 85 Cal. 291.

Gross Negligence.—In some cases the failure to give the required statutory signals has been declared to be gross negligence, Ohio, etc., R. Co. v. Eaves, 42 Ill. 288; Indianapolis, etc., R. Co. v. Stables, 62 Ill. 313; St. Louis, etc., R. Co. v. Faitz, 23 Ill. App. 498, the expression probably having reference to the then received *Illinois* doctrine of comparative negligence. But see Chicago, etc., R. Co. v. Harwood, 90 Ill. 425, where it is denied that, as matter of law, such failure is gross negligence.

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Again, such a failure may be evidence of such gross negligence or wanton negligence as to entitle the plaintiff to recover, notwithstanding negligence intervening on the part of the plaintiff. Louisville, etc., R. Co. *v.* Webb, 97 Ala. 310; Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496. But compare Alabama G. S. R. Co. *v.* Linn, 103 Ala. 134. Or of gross negligence, entitling the plaintiff to exemplary damages. Leavenworth, etc., R. Co. *v.* Rice, 10 Kan. 426. But whether a failure to give signals is gross or simple negligence must depend upon circumstances. Louisville, etc., R. Co. *v.* Webb, 97 Ala. 308; Leavenworth, etc., R. Co. *v.* Rice, 10 Kan. 426.

Question for Jury.—The question whether the failure to ring a bell or sound a whistle was the cause of the injury sustained is a question of fact for the determination of the jury.—Illinois Cent. R. Co. *v.* Benton, 59 Ill. 174; Chicago, etc., R. Co. *v.* McDaniels, 63 Ill. 122, 7 Am. Ry. Rep. 60; Terre Haute, etc., R. Co. *v.* Jones, 11 Ill. App. 322; Indianapolis, etc., R. Co. *v.* Blackman, 63 Ill. 117, 7 Am. Ry. Rep. 56; Chicago, etc., R. Co. *v.* Lee, 68 Ill. 576; Chicago, etc., R. Co. *v.* Dvorak, 7 Ill. App. 555; McCormick *v.* Kansas City, etc., R. Co. 50 Mo. App. 109; Sauerborn *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 429, *affirmed* in 141 N. Y. 553; Cordell *v.* New York Cent., etc., R. Co., 64 N. Y. 535, *reversing* 6 Hun (N. Y.) 461; Calhoun *v.* Gulf, etc., R. Co., 84 Tex. 226; Chicago, etc., R. Co. *v.* Wilson, 133 Ill. 55, 42 Am. & Eng. R. Cas. 153, *affirming* 35 Ill. App. 346.

Speed.—No rate of speed at crossings is negligence *per se*. See Sutton *v.* Chicago, St. P. M. & O. Ry. Co., 10 Am. & Eng. R. Cas., N. S. 100, and *note*, 106.

But see *contra*, Railroad Co. *v.* Lyon, 7 Rep. 556; and Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454.

SOUTHERN RY. CO.

v.

HARRELL.

(Supreme Court of Georgia, May 26, 1898.)

Injuries to Stock—Cattle Guards—Sufficiency of Petition.*—The law imposes upon a railroad company no duty to build or maintain at its own expense cattle guards on its right of way, except at public roads or private ways established pursuant to law, and on the dividing line of adjoining landowners. A suit, therefore, against a railroad company, for damages growing out of its failure to maintain or keep in proper condition a cattle guard, is demurrable, the petition not setting forth that the cattle guard in question was at either of the points on defendant's road above designated.

(Syllabus by the Court.)

ERROR by defendant from Dodge county superior court. *Reversed*.

De Lacy & Bishop, for plaintiff in error.

Roberts & Milner, for defendant in error.

*As to the duty of railroad companies to construct and maintain cattle guards, see generally Atchison, T. & S. F. R. Co. *v.* Billings, 10 Am. & Eng. R. Cas., N. S., 740, and extensive *note*, 746 *et seq.*

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ALABAMA, G. S. R. Co.

v.

FOWLER.

(Supreme Court of Georgia, April 12, 1898.)

Liability of Company for Failure to Erect Cattle Guards—Evidence.*
—In a suit against a railroad company by a landowner for a failure to erect cattle guards, as required by section 2243 of the Civil Code, it is incumbent upon the plaintiff to show upon the trial that such cattle guards were necessary to protect his lands. Where the evidence shows, on the contrary, that there was no necessity for such cattle guard prior to the time it was actually established by the company, a verdict for the plaintiff was contrary to the evidence, and should have been set aside.

(Syllabus by the Court.)

ERROR by defendant from Dade county superior court.
Reversed.

Jacoway & Jacoway and *Shumate & Maddox*, for plaintiff in error.

T. J. Lumpkin and *R. J. & J. McCanny*, for defendant in error.

SIMMONS, C. J., in delivering the opinion of the court, said: "We are of opinion that the plaintiff in this case has not brought his case strictly within the terms of the statute under which he seeks a recovery. The statute provides that railroad companies shall be required to build and maintain cattle guards or stock gaps at certain designated points, "when necessary to protect said lands." It appearing from the evidence that the plaintiff's lands were uninclosed, that the cattle guard, if erected, would be no protection to those lands, we do not think the defendant company was required to erect a stock gap at the place designated. A landowner cannot, by a mere notice that he desires a stock gap erected at a certain point on a line between himself and an adjoining landowner, require the erection of such cattle guard. If this were true, an owner of land might capriciously order the company to erect a cattle guard, and then neg-

*As to the duty of railroad companies to construct and maintain cattle guards, see generally *Atchison, T. & S. F. R. Co. v. Billings*, 10 Am. & Eng. R. Cas., N. S., 740, and extensive note, 746, *et seq.*

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lect to inclose such land; thus rendering the expense to the company absolutely unnecessary, and of no sort of benefit to himself."

ILLINOIS CENT. R. CO.

v.

SANDERS.

(*Supreme Court of Illinois, April 1, 1897.*)

Injury to Employee—Switch Yards—Defective Track*—Employee Not Chargeable with Notice.—The law of Illinois requires railroad companies to furnish reasonably safe tracks within their switch yards; and brakemen whose duties require them to assist in switching and coupling cars when their trains reach such yards, in the absence of knowledge to the contrary, have the right to presume that railroad companies have obeyed such requirement.

Same—Negligence—Evidence.—And where it appeared from the evidence that the injuries of the plaintiff, a brakeman in the employ of defendant, resulted from his foot having been caught between two ties, the space between them being not properly filled, while attempting to couple cars in its switch yard, and that he had no knowledge of the defective condition of the track, it was not error to refuse to direct a verdict for defendant.

APPEAL by defendant from Fourth department appellate court. *Affirmed.*

William H. Green, for appellant.

Samuel L. Dwight and *Frank F. Noleman*, for appellee.

CRAIG, J. in delivering the opinion of the court, said: "But, it is said, conceding appellant permitted certain ties to remain above the ground, and neglected to have the spaces underneath and between the ties filled with a proper substance, and neglected to have the cattle guard properly covered with a suitable passage, yet, as these defects were not concealed, and appellee saw them, or might have seen them, and having notice, he voluntarily took the risk arising out of the danger. If the plaintiff knew, or by the exercise of ordinary diligence might have known, that the track and the cattle guard were dangerous, and, knowing these facts, attempted to make the coupling, and was injured, he

*See note at end of case.

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ought not to recover. But the plaintiff testified—and in this he is not contradicted—that he had no knowledge whatever that the track where the coupling was attempted was out of repair. The law required the railroad company to furnish a reasonably safe track inside of the switching limits where the switching was required to be done; and the plaintiff, in the absence of knowledge to the contrary, had the right to presume that the railroad company had discharged its duty in this regard. It is true that the plaintiff had been on this run for three weeks before the accident, and he had passed over the track twice every day during that time; but in making a round trip of 100 miles, and doing all the switching required in 10 or 12 switch yards, besides handling all the local freight, as was done by the crew constituting the train with which plaintiff was connected, it is unreasonable to suppose that the plaintiff would in so short a time become familiar with the condition of the track where switching was required to be done along the entire line from Centralia to Effingham. The ruling in *Railroad Co. v. Johnson*, 116 Ill. 206, 4 N. E. 381, that the law does not require a brakeman upon a freight train absolutely to know all the defects of construction which may be along the line of the railroad, is applicable here. But it is said the defective track and cattle guard were in plain view, and might have been seen by the plaintiff if he had looked. The coupling of cars is a dangerous service. The work has to be done instantly when the cars come together. A slight misstep or false movement on the part of the brakeman may expose his life or limb to danger. Hence it is apparent, when a brakeman undertakes to make a coupling he has no time to investigate the track, and determine whether it is defective or safe. His whole attention is directed to the cars that are coming together, and the dangerous act he is required to perform, and it cannot be expected that he will stop in the performance of this duty to examine the condition of the track. What is said in *Railroad Co. v. Hines*, 132 Ill. 161, 23

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N. E. 1021, applies here. It is there said: "The burden of furnishing safe machinery, appliances, etc., is upon the master; and while the master is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect (Shear. R. & Neg. [2d. Ed.] § 95; Bish. Noncont. Law, § 678; *Porter v. Railroad Co.*, 60 Mo. 160); and necessarily much more is the servant entitled to assume that his master has furnished him with suitable and safe materials, machinery, and surroundings, and relieved him of investigation and inquiry in this regard, where * * * the performance of his duties requires constancy of attention to other matters. A man whose attention is constantly directed to moving cars, and their coupling and uncoupling, cannot possibly give much attention to the ties, switch bars, etc., over which he may from time to time have to pass." Here, when the coupling was attempted, plaintiff was between two trains. His whole attention was directed to the coupling of the train. He saw no defect in the track, and the cattle guard was not in plain view from his position. The white ring fence which came up to it on the west side had been torn away, and the east ring fence could not be seen. Under such circumstances, plaintiff could not be chargeable with notice of the defective condition of the track. Under the facts as they appear in the record, we are of opinion that the court did not err in refusing to instruct the jury to find for the defendant."

NOTE.

Injuries to Employees From Defective Track.—Brakemen and other employees upon railroad trains having no special reason to acquaint themselves with the condition of the track are not required to know whether or not it is in safe condition. They will not therefore be taken to have assumed all risks of injury from such cause. *O'Donnell v. Allegheny V. R. R. Co.*, 59 Pa. St. 239; *Goheen v. Texas, etc., R. Co.*, 3 Cent. L. J. 382; *Meehan v. Syracuse, etc., R. Co.*, 73 N. Y. 585; *Porter v. Hannibal, etc., R. Co.*, 60 Mo. 160; *Chicago, etc., R. Co. v. Sweet*, 45 Ill. 197; *Harrison v. Central R. R. Co.*

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of N. J., 31 M. J. L. 293; Dale v. St. Louis, etc., R. Co., 63 Me. 455; Porter v. Hannibal & St. Joe R. R. Co., 2 Am. & Eng. R. Cas. 44.

An employee has the right to rely upon the presumption that the company has constructed and maintained its railroad in an ordinarily safe manner. Snow v. H. R. R. Co., 8 Allen, 441; Seaver v. Boston & M. R. R. Co., 14 Gray, 466; Gibson v. Pacific R. R. Co., 46 Mo. 163; Brothers v. Cartter, 52 Mo. 372; Devitt v. Pacific R. R. Co., 50 Mo. 302; Porter v. H. & St. J. R. R. Co., 60 Mo. 160; Dale v. the St. L., K. C. & N. R. Co., 63 Mo., 459. It is the company's duty to provide a safe and properly constructed railroad, and to use all reasonable care and diligence to keep it in a safe condition. Cayzer v. Taylor, 10 Gray, 274; Castle v. Duryea, 32 Baldwin, 480; Morgan v. Cox, 22 Mo. 373; Ryan v. Fowler, 24 N. Y. 420; McDermott v. the P. R. R. Co., 30 Mo. 115; Gorman v. the P. R. R. Co., 26 Mo. 441; Gibson v. the P. R. R. Co., 46 Mo. 163; Kennedy v. N. M. R. R. Co., 36 Mo. 360; Porter v. H. & St. J. R. R. Co., 60 Mo. 160; Lewis, admr. v. St. L. & I. M. R. R. Co., 59 Mo. 504; Keegan v. Kavanaugh, &c., 62 Mo. 232; Whalen v. Centenary Church, 62 Mo. 328; Dale v. the St. L., K. C. & N. Ry. Co., 63 Mo. 459. If the agents of the company, whose duty it is to keep its track in repair, know of its defects, the knowledge of such agents is the knowledge of the company. Harper v. St. L. R. R. Co., 47 Mo. 567; Brothers v. Cartter, 52 Mo. 372; Lewis v. St. L. & I. M. R. R. Co., 59 Mo. 507; Stoddard v. St. Louis, etc., R. R. Co., 65 Mo. 514; Kansas Pacific R. R. Co. v. Little, 19 Kan. 267; Walker v. Bolling, 22 Ala. 294; Chapman v. Erie R. R. Co., 55 N. Y. 579; Malone v. Hathaway, 64 N. Y. 5; Lydon v. Manion, 3 Mo. App. 601. See Walker v. Boston, etc., R. R. Co., 1 Am. & Eng. R. Cas., 141; Holden v. Fitchburg R. R. Co., 2 Am. & Eng. R. Cas. 94; Lanning v. N. Y. etc., R. R. Co., 49 N. Y. 536; Huddleston v. Lowell Machine Shop, 106 Mass. 286; Dale v. St. Louis, etc., R. R. Co., 63 Mo. 455; Conroy v. Vulcan Iron Works, 62 Mo. 35; Gibson v. Pacific R. R. Co., 46 Mo. 163; Porter v. H. & St. J. R. R. Co., 60 Mo. 160; Dale v. St. Louis, etc., R. R. Co., 63 Mo., 459; Wyatt v. Citizens Railway Co., 55 Mo. 485; Whalen v. St. Louis, etc., R. R. Co., 60 Mo. 326; Smith v. Union R. R. Co., 61 Mo. 588; Conroy v. Vulcan Iron Works, 62 Mo. 35; Dale v. St. Louis, etc., R. R. Co., 63 Mo. 455.

SOUTHERN RY. CO.

v.

ARNOLD.

(*Supreme Court of Alabama, Feb. 4, 1897.*)

Injury to Switchman—Negligence of Vice Principal—Sufficiency of Complaint.—In an action against a railroad by its switchman, a complaint which alleges that plaintiff was injured while coupling cars through the negligence of defendant's engineer and yard foreman who had superintendence intrusted to him, states a cause of action.

Same—Coupling Cars*—Assumption of Risk.*—It appeared from the evidence that plaintiff in such action, an experienced switchman,

*See note at end of case.

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was injured while coupling cars at night, while standing on the track with his back to the moving car; that he knew great care and caution was necessary in coupling such cars; and that there was no emergency requiring them to be coupled at the time. *Held*, that he assumed the risk and could not recover.

Same—Failure to Use Ordinary Care.—Under such circumstances, any want, however slight, of ordinary care on the part of plaintiff is sufficient to defeat a recovery in such action.

APPEAL by defendant from city court of Birmingham. *Reversed*.

Smith & Weatherly, for appellant.

Bowman & Harsh, for appellee.

HARALSON, J., in delivering the opinion of the court, said: "The plaintiff, as he himself shows, was experienced in coupling cars, and was familiar with the use of couplers such as were of the pattern used on the cars he attempted to couple. They were, as he says, of a dangerous kind to couple, without the exercise of great care; and that they were dangerous, the injury the plaintiff received fully establishes. Their danger was known to him, and the peril was obvious. This called for the exercise of a higher than ordinary degree of care by him, in his attempt to couple them. *Railroad Co. v. Boland*, 96 Ala. 626, 11 South. 667; *Id.*, 106 Ala. 641, 645, 18 South. 99; *Davis v. Railroad Co. (Ala.)* 18 South. 173."

"There was no emergency or rule of the company, calling on him to incur risk in effecting the coupling, which was not consistent with his safety. The cars, when coupled, were to be left on the track. It was a matter of no serious consequence for them not to have been coupled. The night was dark; the plaintiff had reason to believe that the cars would be run in from the engine onto the switch by a kicking switch, and not by pushing them; he failed to discover on the approaching car any light or other evidence that they were under the control of any one on them; he stood with his back to the cars approaching him, placed his right arm on the stationary car with his lamp on it, as a careless man, or one indifferent to danger might do, adjusted the pin on the stationary car, and attempted,

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with a short stick, to lift the link of the other one as it approached, and in doing so incautiously placed his hand between the dead-woods. He took no note of the speed of the approaching cars, and was attempting in the dark, to make the coupling of cars provided as stated, with double dead-woods, when a kicking switch, as he had every reason to believe had been made, and which had in fact been made. He knew, that in making such a kick of cars, for the purposes of coupling, it was impossible for the engineer to accurately adjust the rate of speed of the approaching cars, kicked as he says, from a distance of from 10 to 15 car lengths, so that they would barely reach the cars at which he was standing. The risk he assumed was voluntary, self-imposed, very great and unnecessary. *Railroad Co. v. Free*, 97 Ala. 234, 12 South. 294; *Railroad Co. v. Bivens*, 103 Ala. 148, 15 South. 515; *George v. Railroad Co. (Ala.)* 19 South. 784, 790; *Warden v. Railroad Co.*, 94 Ala. 277, 279, 10 South. 276."

"We cannot do better than to state the rule of contributory negligence, as applicable to the case, as MR. BEACH has done: 'The standard by which the plaintiff's negligence is to be measured, is the standard of ordinary care, and the rule is correctly and pertinently summed up in *Cremer v. Town of Portland*, by the supreme court of Wisconsin (36 Wis. 92): 'If the plaintiff was guilty of any want of ordinary care and prudence (however slight), which neglect contributed directly to produce the injury, he cannot recover. * * * It is not the law that slight negligence on the part of the plaintiff will defeat the action. * * * Not slight negligence, but any want, however slight, of ordinary care on the part of a plaintiff, is sufficient to defeat the action.'" Beach, *Contrib. Neg.* § 20, 21."

NOTE.

Risks Assumed by Servants in Coupling Cars.—Our readers are referred to the following authorities for a full discussion of the question as to what risks are assumed by a servant employed in coupling cars: *Critchfield v. Richmond & Danville R. Co.*, 78 N. C. 300; *Le Clair v. St. Paul & Pac. R. Co.*, 20 Minn. 9; *Chicago & N. W. R. Co. v. Ward*, 61 Ill. 130; *Chicago, etc., R. Co. v. Munroe*, 85 Ill. 25; *Toledo, etc., R. Co. v. Black*, 88 Ill. 112; *Watson v. Houston*

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& T. C. R. Co., 11 Am. & Eng. R. Cas. 213; Day *v.* Toledo, etc., R. Co., 2 Am. & Eng. R. Cas. 126; Clark *v.* St. Paul & S. C. R. Co., 2 Am. & Eng. R. Cas. 240; Nashville C. & St. L. R. Co. *v.* Wheeler, 4 Am. & Eng. R. Cas. 633; Naylor *v.* Chicago, etc., R. Co., 5 Am. & Eng. R. Cas., 460; Pittsburg, etc., R. Co. *v.* Sentmeyer, 5 Am. & Eng. R. Cas. 508; Houston & T. C. R. Co. *v.* Fowler, 8 Am. & Eng. R. Cas. 504; Northern Central R. Co. *v.* Husson, 12 Am. & Eng. R. Cas. 241; Chicago, etc., R. Co. *v.* Clark, 15 Am. & Eng. R. Cas. 261; Burlington, etc., R. Co. *v.* Coates, *Id.* 265.

TEXAS & P. RY. CO.

v.

BARRETT.

(*Supreme Court of the United States, April, 19, 1897.*)

Injury to Employee—Corporation Created by Act of Congress—Jurisdiction.—A defendant railroad company created by act of Congress is entitled to have the cause removed to a federal court.

Explosion of Boiler—Duty of Inspection.—There was evidence tending to show that plaintiff, while in the employment of defendant as foreman in charge of a switch engine, and at work in its yard, was injured by the explosion of another engine, with which he had nothing, and was not required to have anything, to do, and which had been placed by the foreman of the roundhouse on a track in the yard, with steam up, to take out a train; that the boiler of the locomotive, at the time it exploded, and for a considerable time before that, was and had been in a weak and unsafe state, by reason of the condition of its stay bolts; and that there were well known methods of testing the condition of such bolts; and that if any of these tests had been properly applied to the boiler within a reasonable time before the explosion their condition would have been discovered. *Held*, that a railroad company is not an insurer of the safety of its engines, as it is only bound to use such tests for discovering defects in machinery as it is customary for prudent railroad companies to use.

Same—Liability of Railroad Companies.—A railroad company which has exercised ordinary care to furnish reasonably safe and suitable machinery, is only liable in such an action when its agents were chargeable with notice that the boiler was defective, and there was absence of contributory negligence on the part of plaintiff.

Same—Burden of Proof.*—The burden is on plaintiff throughout such action to show that the engine was unsuitable for use, and that its defects were the cause of its explosion.

Damages—Burden of Proof.—And the burden is on plaintiff to show the extent of his injuries, and the damages he has sustained because of them.

ERROR by defendant to the United States Circuit Court of Appeals for the Fifth Circuit. *Affirmed.*

*See note at end of case.

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John F. Dillon, W. S. Pierce, and D. D. Duncan,
for plaintiff.

A. H. Garland and R. C. Garland, for defendant.

FULLER, C. J. in delivering the opinion of the court, said: "We think that these instructions laid down the applicable rules with sufficient accuracy and in substantial conformity with the views of this court as expressed in *Hough v. Railway Co.*, 100 U. S. 218; *Railroad Co. v. Herbert*, 116 U. S. 647, 6 Sup. Ct. 590; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044; *Railroad Co. v. Daniels*, 152 U. S. 688, 14 Sup. Ct. 756; *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978; and other cases.

NOTE.

Injuries to Employee from Defective Appliances—Negligence—Burden of Proof.—In an action to recover damages for injuries caused by the use of a defective engine, although the evidence may show that the engine was defective, unsafe and insecure, the burden does not devolve upon defendant to show that its condition was not and could not by the exercise of reasonable care and caution have been known to its officers and agents. *Hudson v. Charleston, C. & C. R. Co.*, 41 Am. & Eng. R. Cas. 344. As between master and servant no presumption of negligence arises, on the part of the master, from the mere fact that the servant has been injured while in his employ. *Joliet Steel Co. v. Shields*, 146 Ill. 603, 34 N. E. Rep. 1108. *Short v. New Orleans & N. E. R. Co.*, 69 Miss. 848, 13 So. Rep. 826.

Where a servant was injured by the breaking of a chain used in raising a derailed and wrecked car, the mere fact of the breaking of the chain is not sufficient to authorize any inference or presumption that the master had failed to exercise reasonable care in its selection. *Brymer v. Southern Pac. Co.*, 90 Cal. 496, 27 Pac. Rep. 371.

There must be evidence of negligence connecting him with the injury. The mere fact that machinery proves defective and that an injury results therefrom, does not fix the master's liability. *Johnson v. Chesapeake & O. R. Co.*, 36 W. Va. 73, 14 S. E. Rep. 432.

Where the judge charged the jury "that, if the car was overturned by reason of any defect in said car, or of the track on which it was running, this is in itself presumptive evidence of negligence on the part of the defendant, and the burden is then on the defendant to show that there has been no negligence whatever"—held, that as between master and servant, such presumption of negligence does not so arise, and the charge was erroneous. *Minty v. Union Pac. R. Co.*, 2 Idaho 437, 21 Pac. Rep. 660.

In an action by an employee for a personal injury from being run over by a car while it was being switched, if the negligence of the company in the employment of the foreman or conductor engaged in moving the car, or in furnishing proper appliances, etc., is relied on, the burden of proving such negligence by a preponderance of

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evidence rests upon the plaintiff. *Chicago & E. I. R. Co. v. Geary*, 17 Am. & Eng. R. Cas. 606, 110 Ill. 383.

Where an employee is injured by a collision through the alleged defect of a brake-shoe having worn thin, so that the brake was ineffectual, it is incumbent upon him to prove facts permitting the inference that the brake was not effectual. *Smith v. New York C. & H. R. R. Co.*, 118 N. Y. 645, 23 N. E. Rep. 990, 30 N. Y. S. R. 96; *reversing* 45 Hun 588, 9 N. Y. S. R. 612.

In an action by an employee for injuries caused by the explosion of an engine, the *onus* of proving negligence is on the plaintiff, and it is not enough to prove the fact of injury from the explosion; but the rule is different when the action is brought by a passenger. *Louisville & N. R. Co. v. Allen*, 28 Am. & Eng. R. Cas. 514, 78 Ala. 494; *Toledo, W. & W. R. Co. v. Moore*, 77 Ill. 217.

ALABAMA G. S. R. Co.

v.

ROACH.

(*Supreme Court of Alabama, June 1, 1897.*)

Injury to Employee—Contributory Negligence—Proximate Cause.*
—Proximate contributory negligence on the part of an employee will defeat an action by him based upon the simple negligence of the company.

Same.—It appeared from the evidence that plaintiff had been in defendant's employ as a car inspector for several years; that he, without giving notice of his intention in any way, went under a car on a side track after dark to inspect it and was injured by another car being pushed against the one he was inspecting, and that he knew that cars were continually being pushed in on such side track. Defendant requested the court to charge "if the jury believe all the evidence they must find for defendant." *Held*, that such charge should have been given, whether or not the absence of a lookout on the car being pushed showed negligence on the part of defendant.

APPEAL by defendant from Jefferson county circuit court. *Reversed.*

Smith & Weatherly, for appellant.

Lane & White, for appellee.

NOTE.

Master and Servant—Negligence and Contributory Negligence—Proximate Cause.—In all cases where a servant's want of ordinary care proximately contributes to his injury he cannot recover, even though the master was guilty of negligence and neglect of the implied duties resting upon him. *United States*.—*Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Daub v. Northern Pac. R. Co.*, 18 Fed. Rep. 625; *Baltimore, etc., R. Co. v. Jones*, 95 U. S. 439; *Schofield v. Chicago, etc., R. Co.*, 114 U. S. 617; *Holland v. Chicago, etc., R. Co.*, 18 Fed. Rep. 243; *Aerkfetz v. Humphreys*, 145 U. S. 418; *Hudson v. Charleston, etc., R. Co.*, 55 Fed. Rep. 248; *Aiken v. Smith*, 54 Fed. Rep. 896;

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Gowen *v.* Harley, 56 Fed. Rep. 973; Southern Pac. Co. *v.* Pool, 160 U. S. 438; Erskine *v.* Chino Valley Beet-Sugar Co., 71 Fed. Rep. 270.

Alabama.—Highland Ave., etc., R. Co. *v.* Walters, 91 Ala. 435; Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 13 Am. St. Rep. 84; Mobile, etc., R. Co. *v.* Holborn, 84 Ala. 133; Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508; Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261; Andrews *v.* Birmingham Mineral R. Co., 99 Ala. 438; Burgin *v.* Louisville, etc., R. Co., 97 Ala. 274; Warden *v.* Louisville, etc., R. Co., 94 Ala. 277; Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545.

Arkansas.—Bauer *v.* St. Louis, etc., R. Co., 46 Ark. 388; St. Louis, etc., R. Co. *v.* Bloyd, 60 Ark. 637, 31 S. W. Rep. 457; St. Louis, etc., R. Co. *v.* Ross, 56 Ark. 271.

Colorado.—Chicago, etc., R. Co. *v.* McGraw, 22 Colo. 363.

Connecticut.—Slavin *v.* New York, etc., R. Co., 63 Conn. 573.

Georgia.—Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644; Parker *v.* Georgia Pac. R. Co., 83 Ga. 539, Georgia R., etc., Co. *v.* McDade, 59 Ga. 73; Central R., etc., Co. *v.* Kitchens, 83 Ga. 83; Brunswick, etc., R. Co. *v.* Smith, 97 Ga. 777; Countryman *v.* East Tennessee, etc., R. Co., 89 Ga. 835; Wolf *v.* East Tennessee, etc., R. Co., 88 Ga. 210; East Tennessee, etc., R. Co. *v.* Perkins, 88 Ga. 1.

Illinois.—Chicago, etc., R. Co. *v.* Holdom, 66 Ill. App. 201; Campbell *v.* Mullen, 60 Ill. App. 497; Stobba *v.* Fitzsimmons, etc., Co., 58 Ill. App. 427; Wabash R. Co. *v.* Elliott, 98 Ill. 481; Indianapolis, etc., R. Co. *v.* Flannigan, 77 Ill. 365; Simmons *v.* Chicago, etc., R. Co., 110 Ill. 340; Lake Shore, etc., R. Co. *v.* Roy, 5 Ill. App. 82; Chicago, etc., R. Co. *v.* Avery, 8 Ill. App. 133; Peoria, etc., R. Co. *v.* Ross, 55 Ill. App. 638; Illinois Cent. R. Co. *v.* Stassen, 56 Ill. App. 221; Illinois Cent. R. Co. *v.* Winslow, 56 Ill. App. 462; Atchison, etc., R. Co. *v.* Alsdurf, 47 Ill. App. 200; Chicago, etc., Smelting, etc., Co. *v.* Collins, 43 Ill. App. 478; Clark *v.* Chicago, etc., R. Co., 92 Ill. 43; Wabash, etc., R. Co. *v.* Thompson, 10 Ill. App. 271; Chicago, etc., R. Co. *v.* Merckes, 36 Ill. App. 195.

Indiana.—Louisville, etc., R. Co. *v.* Hobbs, 3 Ind. App. 445; Shoner *v.* Pennsylvania Co., 130 Ind. 170; Indianapolis, etc., R. Co. *v.* Love, 10 Ind. 554; Bedford Belt R. Co. *v.* Brown, 142 Ind. 659; McBride *v.* Indianapolis Frog, etc., Co., 5 Ind. App. 482; Stewart *v.* Patrick, 5 Ind. App. 50.

Iowa.—Deppe *v.* Chicago, etc., R. Co., 36 Iowa 52; Nelling *v.* Chicago, etc., R. Co., (Iowa 1895) 63 N. W. Rep. 568; Baker *v.* Chicago, etc., R. Co., 95 Iowa 163; Haggerty *v.* Chicago, etc., R. Co., 90 Iowa 405; Collins *v.* Burlington, etc., R. Co., 83 Iowa 346.

Kansas.—Missouri, etc., R. Co. *v.* Young, 4 Kan. App. 219; Union Pac. R. Co. *v.* Estes, 37 Kan. 715; Comstock *v.* Union Pac. R. Co., 56 Kan. 228.

Kentucky.—Helm *v.* Louisville, etc., R. Co., 17 Ky. L. Rep. 1004; Illinois Cent. R. Co. *v.* Hilliard, 18 Ky. L. Rep. 505; Briggs *v.* Newport News, etc., Co., 15 Ky. L. Rep. 618; Louisville, etc., R. Co. *v.* Kellum, 14 Ky. L. Rep., 734, (Ky. 1893) 21 S. W. Rep. 230.

Louisiana.—Paland *v.* Chicago, etc., R. Co., 44 La. Ann. 1003.

Maine.—Wormell *v.* Maine Cent. R. Co., 79 Me. 397, 1 Am. St. Rep. 321.

Maryland.—Michael *v.* Stanley, 75 Md. 464.

Massachusetts.—Houlihan *v.* Connecticut River R. Co., 164 Mass. 555; Browne *v.* New York, etc., R. Co., 158 Mass. 247; Riley *v.* Connecticut River R. Co., 135 Mass. 292.

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Michigan.—Fort Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Hathaway *v.* Michigan Cent. R. Co., 51 Mich. 253, 47 Am. Rep. 569; Loranger *v.* Lake Shore, etc., R. Co., 104 Mich. 80; Schaible *v.* Lake Shore, etc., R. Co., 97 Mich. 318; Wilson *v.* Michigan Cent. R. Co., 94 Mich. 20; O'Donnell *v.* Duluth, etc., R. Co., 89 Mich. 174.

Minnesota.—Hughes *v.* Winona, etc., R. Co., 27 Minn. 137; McCarthy *v.* Lehigh Valley Transp. Co., 48 Minn. 533.

Mississippi.—Vicksburg, etc., R. Co. *v.* Wilkins, 47 Miss. 404; Welsh *v.* Alabama, etc., R. Co., 70 Miss. 20.

Missouri.—Taylor *v.* Missouri Pac. R. Co., (Mo. 1891) 16 S. W. Rep. 206; Schroeder *v.* Chicago, etc., R. Co., 108 Mo. 322; Francis *v.* Kansas City, etc., R. Co., 127 Mo. 658; Settle *v.* St. Louis, etc., R. Co., 127 Mo. 336, 48 Am. St. Rep. 633; Craig *v.* Chicago, etc., R. Co., 54 Mo. App. 523; Loring *v.* Kansas City, etc., R. Co., 128 Mo. 349; Gorham *v.* Kansas City, etc., R. Co., 113 Mo. 408; York *v.* Kansas City, etc., R. Co., 117 Mo. 405; O'Mellia *v.* Kansas City, etc., R. Co., 115 Mo. 205; Towner *v.* Missouri Pac. R. Co., 52 Mo. App. 648.

New York.—Tomko *v.* Central R. Co., 1 N. Y. App. Div. 289; LeBahn *v.* New York Cent., etc., R. Co., 80 Hun (N. Y.) 116; Roll *v.* Northern Cent. R. Co., 15 Hun (N. Y.) 496, 80 N. Y. 647; Murphy *v.* New York Cent., etc., R. Co., 11 Daly (N. Y.) 122; Finnell *v.* Delaware, etc., R. Co., 129 N. Y. 669, 42 N. Y. St. Rep. 354; Shields *v.* New York Cent., etc., R. Co., 133 N. Y. 557, 44 N. Y. St. Rep. 72.

Ohio.—Krause *v.* Morgan, 33 Ohio L. J. 304, 53 Ohio St. 26.

Oregon.—Stone *v.* Oregon City Mfg. Co., 4 Oregon 52.

Pennsylvania.—Pittsburg, etc., R. Co. *v.* Evans, 53 Pa. St. 255; Cypher *v.* Huntingdon, etc., R., etc., Co., 1 Pa. Adv. Rep. 850, 149 Pa. St. 359.

Texas.—Fritz *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1895) 30 S. W. Rep. 85; Jones *v.* Galveston, etc., R. Co., 11 Tex. Civ. App. 39; Southern Pac. Co. *v.* Ryan, (Tex. Civ. App. 1895) 29 S. W. Rep. 527; Harrison *v.* Texas, etc., R. Co., (Tex. Civ. App. 1895) 31 S. W. Rep. 242; St. Louis, etc., R. Co. *v.* McClain, 80 Tex. 85; Texas, etc., R. Co. *v.* Young, (Tex. Civ. App. 1894) 27 S. W. Rep. 145; Texas, etc., R. Co. *v.* Cumpston, 4 Tex. Civ. App. 25; Missouri Pac. R. Co. *v.* McKernan, 82 Tex. 204; Houston, etc., R. Co. *v.* Conrad, 62 Tex. 627; Texas, etc., R. Co. *v.* Bingle, 9 Tex. Civ. App. 322.

Utah.—Cook *v.* Bullion-Beck, etc., Min. Co., 12 Utah 51.

Virginia.—Darracott *v.* Chesapeake, etc., R. Co., 83 Va. 288, 5 Am. St. Rep. 266; Chesapeake, etc., R. Co. *v.* Hafner, 90 Va. 621; Richmond, etc., R. Co. *v.* De Butts, 90 Va. 405; Richmond, etc., R. Co. *v.* Pannill, 89 Va. 552, 17 Va. L. J. 99.

Washington.—Schulz *v.* Johnson, 7 Wash. 403; Brennen *v.* Front St. Cable R. Co., 8 Wash. 363.

West Virginia.—Robinson *v.* West Virginia, etc., R. Co., 40 W. Va. 583; Knight *v.* Cooper, 36 W. Va. 232; Johnson *v.* Chesapeake, etc., R. Co., 38 W. Va. 206; Beall *v.* Pittsburgh, etc., R. Co., 38 W. Va. 525; Overby *v.* Chesapeake, etc., R. Co., 37 W. Va. 524, 53 Am. & Eng. R. Cas. 417.

Wisconsin.—Culbertson *v.* Milwaukee, etc., R. Co., 88 Wis. 567; Kennedy *v.* Lake Superior Terminal, etc., Co., 87 Wis. 28; Peffer *v.* Cutler, 83 Wis. 281; Williams *v.* Chicago, etc., R. Co., 64 Wis. 1; Schultz *v.* Chicago, etc., R. Co., 44 Wis. 638; Holum *v.* Chicago, etc., R. Co., 80 Wis. 299.

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LOUISVILLE & N. R. Co.

v.

WOODS.

(Supreme Court of Alabama, April 27, 1897.)

Injuries to Brakeman—Negligence of Engineer—Admissibility of Evidence.—In an action for damages against a railroad company by its brakeman injured by a fall from a car, his fall having been the result of alleged negligence on the part of defendant's engineer in running the train at an excessive rate of speed, it was error to admit evidence to show that it would have been the duty of the rear brakeman on the train, upon seeing that it was going at a dangerous rate of speed, to set up brakes, such evidence not being pertinent to any issue before the jury.

Same—Elements of Damage.*—It was error in such action to permit plaintiff to show the amount of his savings from month to month out of his wages, the amount he was receiving for his services being the legitimate element of damage in this connection.

APPEAL by defendant from Morgan county circuit court. *Reversed.*

Thos. G. Jones, for appellant.

Speake & Russell, for appellee.

NOTES.

Personal Injuries—Loss of Time an Element of Damages.—Where as a result of the injuries complained of the plaintiff has been disabled from the pursuit of his ordinary business for a certain period, there may be a recovery for the value of the time so lost. *Potter v. Metropolitan R. Co.*, 28 L. T. N. S. 735; *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476; *Illinois Cent. R. Co. v. Davidson*, 76 Fed. Rep. 517; *South, etc., Alabama R. Co. v. McLendon*, 63 Ala. 266. And see *Richmond, etc., R. Co. v. Farmer*, 97 Ala. 141; *Ford v. Charles Warner Co.*, (Del. 1893) 37 Atl. Rep. 39; *Broyles v. Prisock*, 97 Ga. 643; *Illinois Cent. R. Co. v. Cole*, 62 Ill. App. 480; *Stewart v. Maddox*, 63 Ind. 51; *Abilene v. Wright*, 4 Kan. App. 708; *Kemper v. Louisville*, 14 Bush (Ky.) 87; *Gaither v. Blowers*, 11 Md. 536; *Harmon v. Old Colony R. Co.*, 168 Mass. 377; *Geveke v. Grand Rapids, etc., R. Co.*, 57 Mich. 589; *Wynne v. Atlantic Ave. R. Co.*, 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 394; *Niendorff v. Manhattan R. Co.*, 4 N. Y. App. Div. 46; *Carples v. New York, etc., R. Co.*, 16 N. Y. App. Div. 158; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; *Owens v. People's Pass. R. Co.*, 155 Pa. St. 334; *Gulf, etc., R. Co. v. Brown*, (Tex. Civ. App. 1897) 40 S. W. Rep. 608; *Galveston, etc., R. Co. v. Waldo*, (Tex. Civ. App. 1895) 32 S. W. Rep. 783; *San Antonio, etc., R. Co. v. Keller*, 11 Tex. Civ. App. 569; *Nones v. Northouse*, 46 Vt. 587; *Parsons v. Harper*, 16 Gratt. (Va.) 64; *Turner v. Great Northern R. Co.*, 15 Wash. 213; *Kliegel v. Aitken*, 94 Wis. 432.

The salary plaintiff was receiving at the time of his injury is the best measure of the value of his time during the period of his disability. *Braithwaite v. Pennsylvania R. Co.*, 177 Pa. St. 1.

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Where Wages Are Paid During Disability.—It has been held that a person injured cannot recover for loss of time, where he continues to receive his wages during the period of disability. *Montgomery, etc., R. Co. v. Mallette*, 92 Ala. 209; *Ephland v. Missouri Pac. R. Co.*, 57 Mo. App. 147; *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375.

On the contrary, however, it has been decided that the fact that the plaintiff's employer did not deduct his salary during the time he was disabled would not, in an action against a third party, mitigate the damages to which the plaintiff was entitled. *Ohio, etc., R. Co. v. Dickerson*, 59 Ind. 317.

Wages Lost Not Recoverable as Such.—With reference to loss of time as an element of damage, *HOLMES, J.*, in *Braithwaite v. Hall*, 168 Mass. 38, said: "When a man is allowed to prove his average earnings or the wages actually lost by him, they are proved as a measure of the value of the time and power to labor of which he has been deprived, not as themselves recoverable *eo nomine*."

It does not follow as a necessary conclusion that the services of a plaintiff before the time of his injury were worth no more than the salary that he was actually receiving for them. But the fact that he accepted service at that price is an important one, and persuasive though not conclusive evidence that the price received was considered by him as a fair valuation. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

RUPPERT

v.

BROOKLYN HEIGHTS R. CO.

(*Court of Appeals of New York, Oct. 12, 1897.*)

Killing of Person in Street—Negligence—Circumstantial Evidence.*

—Where it appears from the evidence that the primary cause of the injury proceeded from one of two sources, for one of which defendant might be responsible, but not for the other, a verdict for plaintiff is unwarranted.

APPEAL by defendant from supreme court, general term, Second department. *Reversed.*

Thomas S. Moore, for appellant.

Henry A. Monfort, for respondent.

O'BRIEN, J., in delivering the opinion of the court, said: "The jury was permitted to find that the defendant was responsible for the obstruction solely upon circumstantial evidence. The circumstances were that the defendant was engaged in paving between the rails, and was obliged to convey the materials for that purpose. It was absolutely necessary in this

*See note at end of case.

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case to prove two facts before the defendant could be adjudged liable for the result of the accident. These facts were: (1) That the defendant, or its servants, produced the obstruction by allowing the stone to fall from the carts, or by placing it there, or leaving it there; (2) the mere fact that it dropped from some of the carts in use by the defendant for drawing the paving stones would not, standing alone, make out the case. The plaintiff was also bound to show that this resulted from careless or improper loading, or some other careless or negligent act of the defendant's servants, since it had a perfect right to use the highway for the purpose of conveying the stones to the point where they were used. It is entirely true that a material fact in a civil or criminal action may be established by circumstantial evidence, but the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established, and to exclude any other hypothesis fairly and reasonably. It has been said that circumstantial evidence consists in reasoning from facts which are known or proved, in order to establish such as are conjectured to exist, but the process is fatally vicious if the circumstance from which we seek to deduce the conclusion depends itself upon conjecture. *People v. Kennedy*, 32 N. Y. 141. In order to prove a fact by circumstances, there should be positive proof of the facts from which the inference or conclusion is to be drawn. The circumstances themselves must be shown, and not left to rest in conjecture, and, when shown, it must appear that the inference sought is the only one which can fairly and reasonably be drawn from these facts. *People v. Harris*, 136 N. Y. 429, 33 N. E. 65. The only circumstance which the plaintiff proved in this case was that the defendant, about the time of this accident, was engaged in drawing paving stones over the street; and the inference which is sought to be drawn from that circumstance is that this granite paving block dropped into the highway from one of the carts through the negligence of the defendant's servants.

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But it appears that, while the defendant was so engaged in moving the paving stone, it was not using or moving any stone of this character, and that other parties were. Hence the reasoning process is defective, since it is at least as reasonable to suppose that the stone in question was left in the street by the careless act of the parties who were using and moving this kind of stone, as by the defendant, who was not. This hypothesis was, of course, much more reasonable; and so the question arises whether a verdict based entirely upon such circumstantial evidence should be permitted to stand. It is a settled principle in the law of negligence, which, it has been said should never be lost sight of, that when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence, the case should not be submitted to the jury, since, in such a case, the evidence fails to establish the essential fact. *Baulec v. Railroad Co.*, 59 N. Y. 357. The jury could, no doubt, have attributed the presence of the stone in the street to the careless act of the other parties who were using granite paving stones with as much reason as they have attributed it to the act of the defendant. The circumstances would clearly warrant that inference quite as clearly as the other, but the verdict imputes that fault to the defendant, against the legal rule which governs the determination of facts upon circumstantial evidence. The case is one, we think, where it appears that the primary cause of the injury proceeded from one of two sources, or was produced by one of two agencies, for one of which the defendant might be responsible, but not for the other. The plaintiff must fail if the evidence does not show that the injury was the result of some cause for which the defendant is responsible. If, upon the testimony, it is just as probable that the injury resulted from the act of the other parties engaged in paving as from that of the defendant the plaintiff cannot recover. *Searles v. Railway Co.*, 101 N. Y. 661, 5 N. E. 66. The testimony in this case subjects the judgment to the operation of this rule, and so, we think, it must be reversed, and a new trial granted; costs to abide the event."

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NOTE.

Negligence—Sufficiency of Evidence.—The plaintiff cannot recover in an action for damages for the negligent killing of his intestate where it appears from the evidence that the death may have resulted from one of several possible causes, some of which were irreconcilable with the possibility of negligence on the part of the defendant. *Kenneson v. West End St. Ry. Co. (Mass.)*, 9 Am. & Eng. R. Cas., N. S., 445.

In an action to recover for injuries received by an employee of a railway company resulting in his death, and alleged to have been caused by a defect in the machinery of a handcar, the only evidence connecting the defendant with the employee's injuries was that the fall which caused the injuries might have been caused by the slipping of the gear of the car, and that the box over the gear would rise sufficiently when a hard grade was being climbed to allow the gear to slip, but it was not established that the fall was caused by the slipping of the gear. *Held*, that the court did not err in instructing a verdict for the defendant. *Clare v. New York & N. E. R. Co. (Mass.)*, 6 Am. & Eng. R. Cas., N. S., 76.

Plaintiff's intestate, a brakeman, was seen standing, in the dark, without a lantern, upon the top of a car of a freight train just before it reached a certain bridge which extended over the track, and his dead body was found upon the same car after the train had passed under the bridge. There was no evidence showing any wound, or bruise upon his person, or other evidence warranting the conclusion that he was struck by the bridge, though the bridge was only seventeen feet above the track and the cars sufficiently high to admit the possibility of such an accident to a man of average height standing upon them. There was no proof as to the height of the deceased, but he had passed but once before under such bridge, and there were no established signals on either side of it to notify trainmen of danger, and the train was moving faster at the time than the rules of the railroad company permitted. *Held*, that the plaintiff had not established by a fair preponderance of evidence every fact essential to his cause of action, and the burden of proof as to all such facts was upon him in an action to recover damages for negligence. *Fitzgerald v. New York Cent. & H. R. R. Co. (N. Y.)*, 9 Am. & Eng. R. Cas., N. S., 434.

KITTEL

v.

AUGUSTA T. & G. R. Co. et al.

(Circuit Court, S. D. New York, Feb. 22, 1897.)

Execution Sales—Directors—Purchasers—Creditors.—C. was a director and creditor of a railroad company; and having purchased its property at the execution sale made to satisfy his claim, transferred the property to another railroad company. *Held*, that the latter company could not be held liable to creditors of the former company for or on account of the price paid by C. at the execution sale.

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Same—Preference of Directors.*—But that C., though he had done no more than was permissible in a creditor not standing in a trust relation to the corporation, must divide the proceeds of the execution sale ratably with plaintiff, a creditor of the company prior to the rendition of the judgment in favor of C., no preference being allowed a director.

John A. Straley, for plaintiff.
Charles B. Meyer, for defendant.

FARMERS' LOAN & TRUST CO.

v.

NESTELLE.

(*Circuit Court of Appeals, Ninth Circuit, Feb. 23, 1897.*)

Insolvency—Mortgages—Judgments for Negligent Killing—Priority.†—A judgment against a railroad corporation for the negligent killing of a passenger is not entitled to priority of payment from a receiver appointed to take possession of and operate the corporate property over a pre-existing mortgage indebtedness.

APPEAL by mortgagee from the Circuit Court of the United States for the Northern Division of the District of Washington. *Reversed.*

Crowley & Grosscup and *John B. Allen*, for appellant.

Carr & Preston and *S. H. Piles*, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, D. J., in delivering the opinion of the court, said: "Upon the principles announced in *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (No. 319) 79 Fed. 227, and the authorities there cited, the order of the circuit court is hereby reversed, with costs in favor of the appellant."

*As to Preference of Directors, see *Atlas Tack Co. et al. v. Macon Hardware Co. et al.* (Ga.), 8 Am. & Eng. Corp. Cas., N.S., —; *Henz v. Van Dusen, et al.* (Wis.), 7 Am. & Eng. Corp. Cas., N. S., 359; *Butler v. Harrison Land & Mining Co.* (Mo.), 7 Am. & Eng. Corp. Cas., N. S., 192, and *note*, p. 203; *Shufeldt et al. v. Smith et al.* (Mo.), 7 Am. & Eng. Corp. Cas., N. S., 204, and *note*, p. 210.

†See *Farmers' Loan & Trust Co. v. Northern Pac. R. Co. et al.* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 81, and *foot-note*.

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NEW YORK SECURITY & TRUST CO.

v.

LOUISVILLE E. & ST. L. C. R. Co. *et al.**(Circuit Court, D. Indiana, March 18, 1897.)*

Insolvency—Mortgages—Judgments for Negligent Killing—Priority.*—A judgment against a railroad corporation for the negligent killing of a passenger is not entitled to priority of payment from a receiver appointed to take possession of and operate the corporate property over a pre-existing mortgage indebtedness, compensation for such injuries not being necessary operating expenses.

Same—Supersedeas Bond—Sureties.—Nor is the claim to indemnity of an unsecured surety on a supersedeas bond given by a railroad company subsequent to a mortgage entitled, upon affirmation of the judgment, to priority over such mortgage.

DEMURRER to answer to intervening petition. *Overruled.*

Miller & Elam, for petitioners.

William L. Taylor, for receivers.

BURLINGTON GASLIGHT CO.

v.

BURLINGTON, C. R. & N. RY. CO.

(Supreme Court of the United States, February 15, 1897.)

Use of Public Lands by Railroads—Grants to Cities—Reservation for Public Uses.—In 1853 congress passed an act (10 Stat. 157) granting to certain cities the land reserved by 5 Stat. 70,178 for a public highway, and for other public uses, and provided that the grant should operate as a relinquishment only of the right of the United States to such land, and should not affect the rights of third persons therein, or to the use thereof. *Held*, that, the reservation being along a navigable river, and two hundred feet in width, it could not be inferred that it was intended for public travel alone, and showed that the uses to which it might be put included all public uses which would tend to facilitate commerce.

Same—Public Use.†—And its use for railroad purposes was a public use within the meaning of the statute.

Same—Abutting Owners—Right to Enjoin.—And such use of the reservation, authorized by the cities, cannot be enjoined, in the absence of constitutional provisions, by an abutting property owner, whatever may be his right to compensation growing out of the injury done his property by the construction and operation of the railroad.

*See *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 81 and *foot-note*.

†See note at end of case.

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ERROR by plaintiff to the Supreme Court of the State of Iowa. *Affirmed.*

P. Henry Smyth, for plaintiff in error.

NOTES.

Public Uses—Lands Used for Railroads.—Where railroads are constructed and operated under the authority of the state legislature, either by corporations or joint stock companies, they are to be deemed constructed and operated for the public use or benefit. See *Bradley v. N. Y. & H. R. Co.*, 21 Conn. 294; *Renesselaer & S. R. Co. v. Davis*, 43 N. Y. 142; *In re Kerr*, 42 Barb. (N. Y.) 121; *Beekman v. Saratoga & S. R. Co.*, 3 Paige Ch. (N. Y.) 45; *Bloodgood v. Mohawk & H. R. Co.*, 14 Wend (N. Y.) 54, 18 Wend. (N. Y.) 17, 18; *Clark v. Rochester*, 5 Abb. (N. Y.) Pr. 124.

In the case of *Olcott v. Fond du Lac Co.*, 16 Wall. (U. S.) 678, the court by STRONG, J., said: "Whether the use of a railroad is a public or private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is, that of the State. Though the ownership is private, the use is public. So turnpikes, bridges, ferries and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*." *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 495; 11 Pet. (U. S.) 419.

So also it is held that although built and operated by private corporations, railroads are in one sense public works. They are for the accommodation of the public and are allowed and protected in their franchises by the public law. *Worcester v. Western R. Co.*, 4 Met. (Mass.) 564. See also 3 Am. & Eng. R. Cas., N. S., note, 32 and 33.

JAMESTOWN & N. R. Co.

v.

JONES.

(*Supreme Court of North Dakota, June 4, 1898.*)

Grant of Right of Way over Public Lands—Pre-emptors.*—As against settlers, the grant of a right of way to a railroad company under the act of congress passed in 1875 attaches only after the profile of the road has been approved by the secretary of the interior, and not from the time the road itself is constructed.

Same.—One who settles upon land before such profile is approved, with intent to make a pre-emption filing thereon, secures such a possessory right therein as is required to be condemned by section 3 of the act, although at the time of his settlement the road has been constructed, and is in full operation. The land is, from the time of such settlement, land disposed of, within the implication of section 4; and hence the settler does not take subject to the right of way,

*See note at end of case.

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which is, under the statute, superior to the title of the settler only as to land disposed of after the approval of the profile.

Same—Failure by Pre-emptor to File Statement.—*Held*, further, that the failure of the settler to file his declaratory statement within the time prescribed by the statute will not affect his rights, as against the railroad company's right of way.

Same—Failure to make Final Proof.—Neither will his omission to make final proof within the statutory period destroy his superior rights, when he is prevented by the fact that there is an uncanceled homestead entry against the land.

Abandonment by Pre-emptor.*—The rule that, when public lands have been entered, they are segregated from the public domain, and that thereafter a railroad grant cannot attach to them, despite the fact that such entry is subsequently abandoned or set aside, does not apply to the grant of a right of way under the act of congress passed in 1875. As against the United States, the grant attaches at the time of the approval of the profile, even though such land has been already filed upon,—subject, however, to such prior entry. But, if the same is thereafter canceled or abandoned, the grant of the right of way becomes absolute.

(Syllabus by the Court.)

APPEAL by plaintiff from Stutsman county district court. *Affirmed*.

Bull, Watson & Maclay and *James B. Kerr*, for appellants.

S. E. Elsworth, for respondent.

CORLISS, C. J., in delivering the opinion of the court said: "Plaintiff claims that it is entitled to a right of way over the defendant's land. It is conceded that it has never purchased or condemned such right of way. All the title it has must rest upon the act of congress passed March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." Section 1 of that act declares "that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the congress of the United States, which shall have filed with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the con-

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struction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turn-outs and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.'

"Defendant, at the outset, lays down the broad proposition that, when the grant became operative as to the plaintiff, the land in question was no longer public land, because of the fact that there were then outstanding two pre-emption and one homestead filings against it. And in this connection he cites a number of decisions in support of the well-established doctrine that in cases of land grants (not, however, for a right of way) the character of the land as public land is fixed by its condition at the moment the grant attaches, and that, therefore, if any portion of the grant has been previously segregated from the public domain by entry, it does not fall within the terms of the grant, even though such entry be thereafter abandoned or set aside. *Railroad Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112; *Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566; *Bardon v. Railroad Co.*, 145 U. S. 535, 12 Sup. Ct. 856; *Railroad Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98; *Whitney v. Taylor*, 158 U. S. 85, 15 Sup. Ct. 796. We do not think that these decisions apply to the act under which plaintiff claims. When the act of 1875 is construed as a whole, we believe that, as against the United States, the right of way is transferred, even when the land has been entered at the time the map is approved, and that, if such entry is subsequently abandoned or set aside, the grantee will enjoy an absolute easement in the land. The rights of the railroad company will be subject to all rights which have attached to the land before the filing and approval of the map of definite location. But, as against the United States, the grant is as effective in cases where the land has been entered as where it has not. Under any other view of the statute, the railroad company might be compelled to condemn successive rights of settlers, only to find that all its proceedings were futile, because in each

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case the settler's rights were, by cancellation or abandonment, destroyed. We think that it was the purpose of congress to make the grant operative as against the government, subject only to existing rights of settlers, and that the question whether a particular piece of land was within the terms of the grant, so far as the government was concerned, was not to depend upon the freedom of that land from settlement at the time the map was approved. Under this view of the statute, a railroad company could never be required to condemn any other than existing rights. When those should once be condemned, the destruction or abandonment thereof, followed by a new entry, would not force the grantee to assume anew the burden of condemning subsequent rights, and meeting with a similar experience, to take up again, perhaps, the Sisyphean task of toiling hopelessly for title, only to find each time that all its efforts had proved abortive. Nor are we without express authority on this point. *Hamilton v. Railway Co. (Idaho)* 28 Pac. 408. The decision of the court in that case, accurately stated in the syllabus, is as follows: 'One Wilkins filed declaratory statement November 7, 1888, and relinquished the same October 5, 1889, on which day Daniel made homestead entry of the same tract, and on April 29, 1890, made cash entry of said tract, and on September 3, 1890, conveyed by warranty deed to Hamilton a portion of said tract. The railroad company claims right of way over tract conveyed to Hamilton, by reason of compliance with act of congress of March 3, 1875, and the approval of the plat by the secretary of the interior July 11, 1889. Hamilton claims damages because of company grading its roadbed through said conveyed tract. Held, that Wilkins' pre-emption filing did not exempt said land from the grant of right of way to the company, as he relinquished the same before perfecting the title; that there was no priority of estate between said Wilkins and Daniel: that patent to Daniel would take effect, by relation, October 5, 1889, the date of Daniel's homestead entry, and would not antedate the grant to the company.' And

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in *Alexander v. Railroad Co.* (Mo. Sup.) 40 S. W. 104, the same doctrine was announced and applied."

NOTES.

Public Lands—When Railroad Grant Attaches—Rights of Pre-emptors.—The rights of a pre-emption claimant to public land of the United States are reserved by the Act of Congress of March 3, 1875, entitled "An act granting to railroads a right of way through the public lands of the United States;" and where a railroad appropriates public lands upon which a pre-emption entry has been properly made prior to the filings of a profile of the road in the office of the secretary of the interior the railroad is liable for damages. *Enoch v. Spokane Falls & N. R. Co.*, 6 Wash. 393, 33 Pac. Rep. 966.

Under the Act of Congress of March 3, 1875, before a railroad company can acquire a right of way over public lands, or lands for station purposes, it must file with the register of the land office for the district a profile of its road, as required by section 4 of the act; therefore, where a company files a map of land it desires for station purposes, before it files a profile of its road, but an individual files his declaratory statement and settles on the land before such profile is filed, a patent issued to him is good as against the claim of the road; *Lilienthal v. Southern Cal. R. Co.*, 56 Fed. Rep. 701.

Same—When Rights of Pre-emptors Attach.—The congressional grant of lands in aid of the Northern Pacific Railroad applied only to such lands to which "the United States had full title not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of such road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office." *Held*, that lands entered as mining claims, for which applications for patents were pending when the plat of the road was filed, are not included in such grant, although such lands were subsequently declared to be agricultural, and the entries as mining claims held to be invalid. *Northern Pac. R. Co. v. Sanders* (C. C.), 46 Am. & Eng. R. Cas. 431.

In *Whitney v. Taylor*, 45 Fed. Rep. 610, it appeared that Act Cong., July 1, 1862 (12 U. S. St. 489), granted in aid of a railroad company all the odd-numbered sections of land within certain limits "to which a pre-emption or homestead claim may not have attached." In 1857 one J. had filed a pre-emption declaratory statement on land within the terms of the subsequent grant, which statement remained intact until after the final location of the railroad, and until 1885, when it was cancelled because J. had never lived on the land. *Held* that, notwithstanding the subsequent cancellation of the statement, the pre-emption claim had attached to the land within the meaning of the statute, and hence such land is excluded from the grant, and is open to settlement after such cancellation. The court said: "The failure of Jones to comply with the pre-emption laws did not cause the land to revert to the railroad company, and it did not, by reason of any failure of his to comply with the law, become a part of the grant; but, upon the cancellation of his statement, the land was open for settlement. This conclusion is sustained by the land department, and upheld by the decisions of the supreme court of the United States in *Leavenworth, L. & G. R.*

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Co. v. United States, 92 U. S. 734; Newhall v. Sanger, 92 U. S. 761; Kansas Pac. R. Co. v. Dunmeyer, 113 U. S. 629; Hastings & Dakota R. Co. v. Whitney, 132 U. S. 357, 40 Am. & Eng. R. Cas. 426, and by the supreme court of Nebraska. Burlington & M. R. Co. v. Abink, 14 Neb. 95, 10 Am. & Eng. R. Cas. 686.

It is true that in several of these cases there was either a valid homestead claim initiated by settlement followed by an entry, or a pre-emption claim initiated by a settlement followed by a declaration of intention to purchase; but the decisions are based upon the fact of the filing of the declaratory statements in the proper land-office. The cases all proceed upon the theory that when this claim is filed the right of the applicant becomes 'attached to the land.' The word 'claim,' as used in the act, was not intended to be restricted to such homestead and pre-emption claims as should afterwards ripen into perfect title, but was intended to include all claims that were made in such form as to be recognized and allowed by the land-office, without any regard to the question whether they were valid at the time of the filing, or whether they were afterwards perfected, abandoned, cancelled, or forfeited. In Kansas Pac. R. Co. v. Dunmeyer, *supra*, the court, in distinguishing the case from Natoma Water & Mining Co. v. Bugbey, 96 U. S. 165, said: 'In the case before us, a claim was made and filed in the land-office, and there recognized, before the line of the company's road was located. That claim was an existing one, of public record, in favor of Miller, when the map of plaintiff in error was filed. In the language of the act of congress, this homestead claim had attached to the land, and it therefore did not pass by the grant. Of all the words in the English language this word "attached" was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land-office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds.'"

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Contributory negligence—question for jury.

Walker *et al.* v. Shelton (Kan.), 15.

In an action to recover for death of person found dead, after a collision, in a foot-path habitually used by the public, as the company had notice, the questions of negligence and contributory negligence are for the jury.

Washington v. Missouri, K. & T. Ry. Co. of Texas (Tex.), 829.

Killing of employee on track—contributory negligence.

Foss *et al.* v. Old Colony R. Co. (Mass.), 41.

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Western & A. R. Co. v. Bass (Ga.), 608.

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Walker v. McNeill (Wash.), 738.

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Self-disserving declaration of decedent, in action to recover for injury alleged to have caused his death, is not conclusive against plaintiff.

Camden & A. R. Co. v. Williams (N. J. App.), 600.

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Louisville & N. R. Co. *v.* Anchors (Ala.), 657.

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Admissibility of evidence of sales of similar property.

Snouffer *v.* Chicago & N. W. Ry. Co. *et al.* (Iowa), 571.

Damages not allowed for improvements made before condemnation by railroad company lawfully on land.

Charleston & W. C. Ry. Co. *et al. v.* Hughes *et al.* (Ga.), 541.

Instruction as to determination of market value of land.

Snouffer *v.* Chicago & N. W. Ry. Co. *et al.* (Iowa), 571.

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Action for wrongful ejection.

Lexington & E. Ry. Co. *v.* Lyons (Ky.), 212.

Admissibility.

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Admissibility, in condemnation proceedings, of evidence of sales of similar property.

Snouffer *v.* Chicago & N. W. Ry. Co. *et al.* (Iowa), 571.

Admissibility of evidence as to conduct of one acting as ticket agent.

Gulf, C. & S. F. Ry. Co. *v.* Moorman (Tex.), 157.

Admissibility of evidence, in action to recover for injuries to boy on street-car track, whether motorman could have seen him.

EVIDENCE—Continued.

Baltimore City Pass. Ry. Co. *v.* Cooney (Md.), 759.

Admissibility of evidence of condition of grab-iron causing injury six days after accident. Jones *v.* N. H. & H. R. Co. (R. I.), 414.

Admissibility of evidence of number of hands employed on train, where it is not alleged that injury was caused by failure to furnish a sufficient number.

Jones *v.* New York, N. H. & H. R. Co. (R. I.), 414.

Admissibility of evidence of other holes in a platform. Louisville & N. R. Co. *v.* Henry (Ky.), 405.

Admissibility of evidence of passenger's business and profits.

Chicago, R. I. & P. Ry. Co. *et al. v.* Posten (Kan.), 138.

Admissibility of evidence of subsequent repairs.

Louisville & N. R. Co. *v.* Henry (Ky.), 405.

Admissibility of opinion of expert.

Hayes *v.* Southern Pac. Co. (Utah), 419.

Admissibility of opinion of medical expert.

Fulmore *v.* St. Paul City Ry. Co. (Minn.), 636.

Admissions of deceased as evidence in action for death by wrongful act.

Helman *v.* Pittsburg, C. C. & St. L. Ry. Co. (Ohio), 641.

Assumption of risk—sufficiency of evidence.

Walker *v.* McNeill (Wash.), 738.

Evidence as to measure of damages in action against railway company to recover for gravel removed.

Illinois Cent. R. Co. *v.* Le Blanc (Miss.), 838.

Evidence of subsequent experiment admissible.

Hayes *v.* Southern Pac. Co. (Utah), 419.

EVIDENCE—Continued.

In an action against a railway company to recover for injuries caused to an employee by alleged negligence in planking a crossing, evidence of the condition upon which the company received its street rights is admissible.

Valley Ry. Co. *v.* Keegan (C. C. A.), 507.

In an action against a street railway for personal injuries, a photograph of a car other than the one occasioning the injury is inadmissible in evidence.

Baltimore City Pass. Ry. Co. *v.* Cooney (Md.), 759.

Irrelevant evidence.

Louisville & N. R. Co. *v.* Woods (Ala.), 872.

Master mechanic of street railway may testify, in action by a boy to recover for personal injuries, as to whether boy could ride by hanging on ledge of car which caused injury, but cannot testify as to other cars.

Baltimore City Pass. Ry. Co. *v.* Cooney (Md.), 759.

Minutes of meeting of directors. Coos Bay, R. & E. R. R. Co. & Nav. Co. *v.* Siglin (Ore.), 714.

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Ruppert *v.* Brooklyn Heights R. Co. (N. Y.), 873.

Newly discovered evidence as ground for new trial.

Jones *v.* New York, N. H. & H. R. Co. (R. I.), 414.

Violation of rules as evidence of negligence.

Smithson *v.* Chicago G. W. Ry. Co. *et al.* (Minn.), 726.

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Assumption of risk of falling of embankment.

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EXECUTION SALE.

A company purchasing a railroad from a director who had purchased it at an execution sale is not liable to the creditors of the original company for the price paid by the director at the execution sale.

Kittel *v.* Augusta T. & G. R. Co. *et al.* (C. C. N. Y.), 876.

EXEMPLARY DAMAGES.

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Liability of master for injuries to employee where fellow servant substituted defective appliance in place of safe and suitable appliances.

Campbell *v.* New Jersey Dry-Dock & Transp. Co. (N. J.), 12.

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Bussey *v.* Charleston & W. C. Ry. Co. (S. Car.), 474.

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Louisville, N. A. & C. Ry. Co. *v.* Heck, (Ind.), 382.

Train dispatcher who controls and directs the movements of trains the vice-principal of trainmen.

Louisville, N. A. & C. Ry. Co. *v.* Heck (Ind.), 382.

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- Duty to fence.
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- Duty to fence at wagon cross-
ings in cities.
Croft *v.* Chicago G. W. Ry.
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- Where stock is killed in city
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- No liability for frightening
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- Effect of judgment against in-
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- Duty of master to inspect for-
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Louisville & N. R. Co. *v.* Veach
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- Louisville & N. R. Co. *v.*
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- An instruction that servant
using appliances with knowl-
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- Charge as to prejudice against
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- Defendant is estopped to com-
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Failure to instruct as to care to be exercised by railroad in street.

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In actions for injuries to children.

Gulf, C. & S. F. Ry. Co. *v.* Johnson *et al.* (Tex.), 291.

In an action by an employee to recover for personal injuries, an instruction as to latent defects is reversible error where it was decided on appeal that the defects complained of were patent.

Fordyce *et al.* *v.* Edwards (Ark.), 521.

Instruction as to method of determining market value of land in condemnation proceedings.

Snouffer *v.* Chicago & N. W. Ry. Co. *et al.* (Iowa), 571.

Instruction in action for death of employee that recovery may be had if death resulted from defective appliance should present defenses of contributory negligence and waiver.

Ford *v.* Chicago, R. I. & P. Ry. Co. (Iowa), 489.

Permanent disability.

Lake Shore & M. S. Ry. Co. *v.* Conway (Ill.), 7.

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Bussey *v.* Charleston & W. C. Ry. Co. (S. Car.), 474.

Sufficiency of general instruction as to liability of master for furnishing unsafe appliance where no specific instruction is asked.

Bussey *v.* Charleston & W. C. Ry. Co. (S. Car.), 474.

Unwarranted instructions.

Ford *v.* Chicago, R. I. & P. Ry. Co. (Iowa), 489.

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State *ex rel.* Nolan, Atty. Gen., *v.* Montana Ry. Co. *et al.* (Mont.), 353.

Liability of lessor of street railway for injury caused by defective track.

Schaefer *v.* City of Fond du Lac (Wis.), 342.

Liability of lessor and city for injury caused by defective street-car track.

Schaefer *v.* City of Fond du Lac (Wis.), 342.

Obligation of lessee to operate. State *ex rel.* Grinsfelder *v.* Spokane St. Ry. Co.

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Notice to servant of habitual use of track—when notice to master.

Comer *et al.* *v.* Hill (Ga.), 3.

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Enforceability at law of lien upon gross earnings of railroad company.

Grand Trunk Ry. Co. *v.* Central Vt. R. Co. (C. C. Vt.), 693.

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Mandamus will lie at the instance of an abutting owner to compel a street railway to operate its line.

State ex rel. Grinsfelder v. Spokane St. Ry. Co. (Wash.), 62.

Nature of trial of question as to granting application by abutting owner for mandamus to compel operation of street railway line.

State ex rel. Grinsfelder v. Spokane St. Ry. Co. (Wash.), 62.

Trial of application for mandamus to compel operation of street railway line is that of an action at law.

State ex rel. Grinsfelder v. Spokane St. Ry. Co. (Wash.), 62.

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Assumption of risk of falling embankment.

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Assumption of Risk.

Assumption of risk must be pleaded and proven.

Walker v. McNeill (Wash.), 738.

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Southern Ry. Co. v. Arnold (Ala.), 864.

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Bussey v. Charleston & W. C. Ry. Co. (S. Car.), 474.

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Instruction in action for death of employee that recovery may be had if death resulted from defective appliance should present defenses of

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Ford v. Chicago, R. I. & P. Ry. Co. (Iowa), 489.

Instruction that servant having knowledge of defects in appliance assumes risk therefrom and instruction that it is master's duty to see that the appliances are safe and suitable are not inconsistent.

Bussey v. Charleston & W. C. Ry. Co. (S. Car.), 474.

Servant who is chargeable with notice of defect assumes risk of injury therefrom.

Walker v. Atlanta & W. P. R. Co. (Ga.), 498.

Sufficiency of evidence.

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Using appliance after knowledge of defect.

McGhee et al. v. Bell (Ky.), 519.

What must appear in order to authorize presumption that a servant assumed risk of defective roadbed.

Valley Ry. Co. v. Keegan (C. C. A.), 507.

Where it is admitted that deceased knew that an appliance was defective, burden is on plaintiff to show that his decedent was justified in running risk of injury from such defect.

Ford v. Chicago, R. I. & P. Ry. Co. (Iowa), 489.

Brakeman knowing that culverts are uncovered assumes risk of injury therefrom.

West v. Southern Pac. Co. (C. C. A.), 447.

Brakeman not chargeable with notice that track is unsafe.

Illinois Cent. R. Co. v. Sanders (Ill.), 861.

Burden of proof as to knowledge of defects in action for death of servant.

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- Burden of proving due care where employee is killed on track.
- Dyer *v.* Fitchburg R. Co. (Mass.), 473.
- Complaint alleging that brakeman was injured through negligence of engineer and foreman states cause of action.
- Southern Ry. Co. *v.* Arnold (Ala.), 864.
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- Alabama G. S. R. Co. *v.* Roach (Ala.), 869.
- Duty of company to use self-couplers.
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- Duty to inspect foreign cars.
- Louisville & N. R. Co. *v.* Veach (Ky.), 24.
- Elements of recovery for injury received by employee.
- Bussey *v.* Charleston & W. C. Ry. Co. (S. Car.), 474.
- Employee walking in unlighted roundhouse killed by falling in pit of which he knew was guilty of contributory negligence.
- McDonnell *v.* Illinois Cent. Ry. Co. (Iowa), 534.
- In action to recover for personal injuries caused by alleged defective engine, burden is on plaintiff to show that it was unsuitable and that the defects caused his injuries.

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- Texas & P. Ry. Co. *v.* Barrett (U. S.), 867.
- In an action against a railway company to recover for injury caused to an employee by alleged negligence in planking a crossing, evidence of the condition upon which company received its street rights is admissible.
- Valley Ry. Co. *v.* Keegan (C. C. A.), 507.
- Injury to brakeman coupling cars.
- Illinois Cent. R. Co. *v.* Sanders (Ill.), 861.
- Injury to employee from defective grab-iron.
- Jones *v.* N. H. & H. R. Co. (R. I.), 414.
- Injury to engineer running his engine at speed in excess of that allowed by ordinance.
- Missouri, K. & T. Ry. Co. *v.* Roberts (Tex. App.), 21.
- Killing employee on track, burden of proving due care.
- Tumalty *v.* New York, N. H. & H. R. Co. (Mass.), 468.
- Killing of employee on track—contributory negligence.
- Foss *et al.* *v.* Old Colony R. Co. (Mass.), 41.
- Liability of company failing to discover defect in foreign car.
- Jones *v.* New York, N. H. & H. R. Co. (R. I.), 414.
- Liability of master for injury to servant employed by conductor in an emergency.
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- Master bound to use only those tests ordinarily used to discover defects in machinery.
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- Master not liable for injuries received by servant through defects in appliances substituted by fellow-servant in place of safe and suitable appliance furnished by master.
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- Not duty of company to enclose roundhouse pits where such enclosure would render pits useless.
McDonnell v. Illinois Cent. Ry. Co. (Iowa), 534.
- Notice to servant—when notice to master.
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- Proximate Cause.**
 Failure of division superintendent to comply with rules of company the proximate cause of collision.
Louisville, N. A. & C. Ry. Co. v. Heck (Ind.), 382.
- Master, though negligent, not liable for injury to servant if his negligence was not proximate cause of injury.
Little Rock & M. R. Co. v. Barry (C. C. A.), 453.
- Servant not chargeable as a matter of law with notice of defect in track in a yard a mile long and having 22 tracks
Valley Ry. Co. v. Keegan (C. C. A.), 507.
- Servant obeying a command which orders him into obvious danger assumes the risk.
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- Structure near Track.**
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- Negligence.
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- Tower-man not chargeable with

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- notice of defective condition of track near tower.
Lake Shore & M. S. Ry. Co. v. Conway (Ill.), 7.
- Where a company's rules give to a train dispatcher's act all the effect of an act of the division superintendent the company is responsible therefor in the same degree as for an act of such superintendent.
Louisville, N. A. & C. Ry. Co. v. Heck (Ind.), 382.
- Where an employee is injured by reason of a defect of the existence of which he is chargeable with notice, the master's negligence is a question for the jury.
Walker v. Atlanta & W. P. R. Co. (Ga.), 498.
- Where ordinary care has been exercised to furnish safe machinery master not liable for injuries from defects, unless his agents were chargeable with notice of defects and plaintiff was free from contributory negligence.
Texas & P. Ry. Co. v. Barrett (U. S.), 867.
- Whether brakeman, off duty, on his way to collect tickets in absence of the conductor is acting in the line of his duty is a question for the jury.
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- Admissibility of opinion evidence of.
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- Priority of mortgage over claim to indemnity of unsecured surety on supersedeas bond given by company subsequent to mortgage.
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 Ryan v. Northern Pac. Ry. Co. (Wash.), 647.
 Failure to give signals and slacken speed for crossing is not negligence *per se* in action to recover for stock killed beyond crossing.
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- Master not liable, though negligent, for injury to employee, if such negligence was not the proximate cause of the injury.
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- Smithson *v.* Chicago G. W. Ry. Co. *et al.* (Minn.), 726.
 Where evidence is conflicting as to whether engineer was negligent in failing to see stock on track, his negligence is question for jury.
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- Snyder *et al.* *v.* Ft. Madison St. Ry. Co. (Iowa), 53.
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